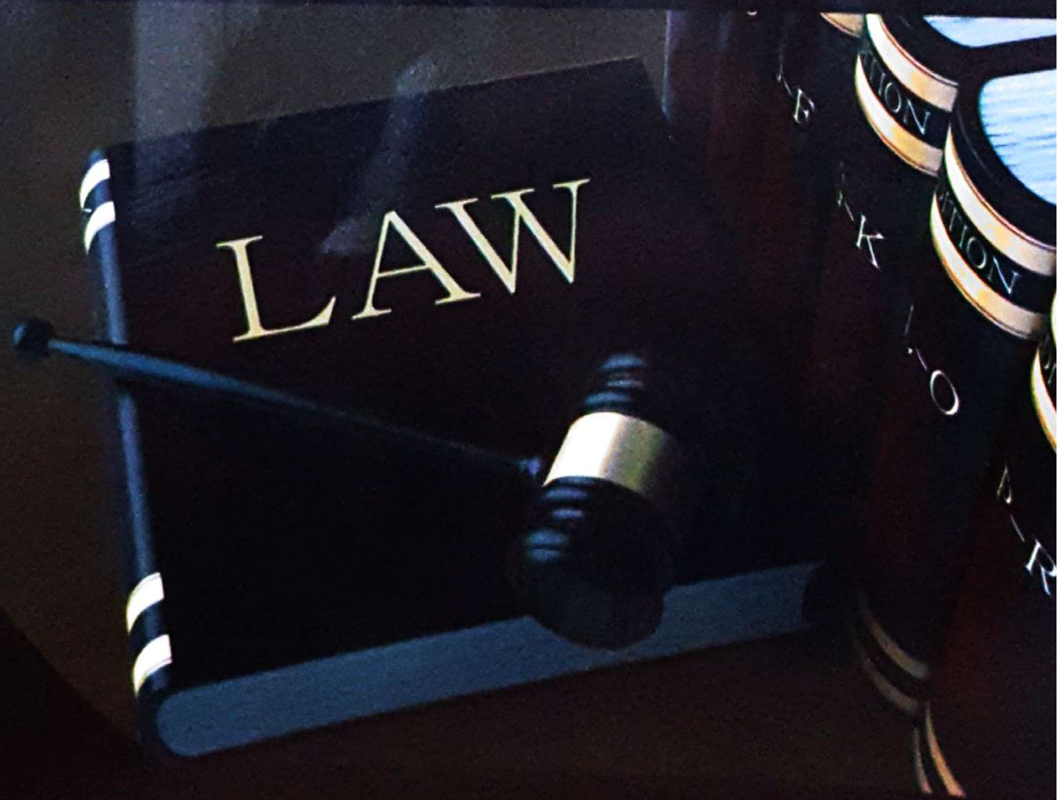
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INTRODUCTION TO THE STUDY of LAW





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PREFACE

The aim of these pages falls far short behind writing a book on Jurisprudence in accordance with scientific legal techniques. ur aim is to introduce the student to the study of law in English, with a great concentration on a large number of legal terms. Undoubtedly, such a study is useful for all those interested in acquainting themselves with foreign legal systems, and all those who may have the lucky chance of proceeding to post graduate studies abroad.

No great or deep analyses have been made in the following pages. The material they present is by no means original. It comprises notes I have taken in the LL. M. seminar of jurisprudence in the University of London, my own notes on readings I have made, and quotations from texts mentioned in the list of bibliography.

Consequently, these pages should better be described as a «book let», or a «terminological guide - book», for this is most in keeping with their modest aim.

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BIBLIOGRAPHY

al-Bazzaz, Abdul Rahman, "Principles of jurisprudence" (2nd ad. 1958) (In Arabic).

Allen, C. K "Law in the Making" (6th ed. 1958) (Oxford paper-backs No. 29).

al- Sanhouri, Abdul Razzaq, and abustate, Ahmad Hishmat, jur-isprudence, or Introduction to the Study of law" (1952). (In arabic).

Goadby, F.M, "Introduction to the Study of Law" (2nd imp. 1910).

HOLLAND, T. E, "The Element of jurisprudence" (13th ed. 1924).

HOOD Philips, O, "A FIRST Book of English law" (4th ed. 1960).

Kirah, Hassan, "jurisprudence" (2nd ed. 1959-1960) (In Arabic).

Lloyd, D, "Introduction to jurisprudence (2nd 1965).

Lloyd, D, "The Idea of law" (1964) (Penguim Books).

Maine, H, "Ancient law" (1959) (Oxford's World Classics).

Paton, G.W. "A Text-BOOK of jurisprudence" (3rd ed. 1964).

Salmond, J, " jurisprudence" edited by Glanville Williams (11th ed. 1957)

INTRODUCTION

1 - Approaches to the study of law

There are several different ways by which we may study law.

One method is to instruct law students with the knowledge of the law through actual practice. Like a would - be craftsman, a law student would gradually gain skill, under the guidance of a master, in the art of his profession. The advantage of this method is that it fits, in one sense, the aim of law. Law is practical, and its value depends on its practical effects. There fore, the best way for learning law is to be acquainted with its working and to gain skill in applying it.

But although law is practical in aim, yet it is more than a collection of rules which can be learnt by practice.

General ideas underlie every part of the law, and each particular case is but an application of these ideas. These general ideas, or broad principles cannot be understood unless they are studied independently of practice.

Again, although law is a practical study, a lawyer, if he wishes to be successful, should know the other aspects of his profession. The complete study of law requires, firstly, a know ledge of «legal history». Law is not the creation of a day, but a long drawn - up process of growth. Present day law can there fore be understood only through a study of the law in th past. Moreover. legal history assists the lawyer to understand the legal rules to be applied to social relations. Law is part of the general history of society; it has adapted itself to social needs as they change from generation to generation. Consequently, its

partment of it, but the science for the study of the general principles and concepts which underue existing legal systems.

The discussion of these general principles and concepts, i. e, the study of jurisprudence, concentrates itself around two main topics. It aims first at an analysis of the «nature of law». that is to say, to ascertain by analysis the elements from which the idea of law is composed, both in present and past times; This will difinitely reveal the fact that the purpose of law is the regulation of human conduct, or more precisely, the regulation of legal relations as they appear from human conduct. Consequently, jurisprudence should secondly, deal with the nature of the different kinds of relations recognised or created by law, such as ownership, marriage, contract, possession, liability, and the like.

Jurisprudence is not an easy science of study. It deals with abstract notions, with the meaning of law and legal relations, and not with the rules of lraqi, Egyptain, or French law. But whether it is more appropriate to teach the science of jurisprudence at the begining, or at end, of a legal course, there are advantages in making a study of the easier part of the science preliminary to the study of existing law. The introductory study of general legal notions makes for the easy mastery by the student of the rules of his own system, the respect for other legal systems and general principles in general, and gives the opportunity for discussing law in its wider field of interest, that is in its contact with other sciences of human conduct.

The present guide - book is an attempt to place before the Iraqi student of law the outlines of the science of jurisprudence, presented with special reference to the Iraqi legal system. It is entitled «Introduction to the study of law» because it does not profess to encompass the strict scope of jurispurdence. Being, generally, a study to law and

legal relations, this «Introduction» is to be divided in to two main parts. The first deals with the «Theory of Law», and the second treats the nature of legal relations and therefore, entitled «The Theory of Legal Rights».

PART ONE
THE THEORY OF LAW

I
THE CONCEPT OF LAW

At the threshold of our legal study we are confronted with a much discussed problem; that is, what do we understand by the term «law»? The definition of law must first be attempted, and the relation of law to other aspects of human conduct should next be exposed. But different legal philosophers have understood law differently. Philosophical concepts of law will be treated seperately in the next chapter to follow.

1 - Definition of law

The word «Law» is used in several different senses. It is our duty to distinguish these different meanings, so that we can arrive at the concept that lies within the lawyar's field of study.

The word «Law» is used in a figurative sense to express those uniformities which have been observed to run through external nature, or social relations. Thus scientists speak of the «Law of Gravity», and economists speak of the «Law of Offer and Demand». The same word is, sometimes, used to connote any established rule which has a definite consequence, as when philosophers talk about the «Moral Law». or the «Law of Nature», or «Laws of Beauty». Again in Iraq as in other Islamic countries, the term «Sharia» is in common use. Although it means the «Sacred law of Islam», the word «Sharia» in itself includes, strictly speaking, all kinds of «Law» used among men.

However the various meanings of the term «law» connote the idea

of «Order» or «Uniformity». If used more strictly, it also connotes the idea of «Authority». This second idea carries with it the notion of «Compulsion» or «Enforcement». These three ideas could, in fact, be said to form the basis of any preliminary and general difinition to law. However, the student should not form the impression that the various schools of jurisprudence fully agree in relation to the question of the objective content of law. (or, the nature of law). Great differences exist among legal philosophers in this connection, as we shall see in the following chapter. with this warning in mind, law could be defined as «the body of general rules and principles regulating human conduct in society, the obedience to which is enforced by a supereme authority. From this General definition, it can easily be inferred that, for a rule to be law, three conditions must be fulfiled:

1 - The rule should be general.

2 - It should regualte human conduct in society.

3 - Obedience to it should be enforced by a supreme authority, or, in other words, there should exist a «sanction» for the enforcement of the rule.

2 - law, Religion and Morals

We have become accustomed in modern times to the purely secular conception of law as made by man for man and to be judged accordingly in purely human terms. Very different was the attitude of earlier ages. Law religion, and morality were treated as inevitably interrelated.

In its modern concept, law is temporal and positive, while religion is divnie. There fore, what religion ordains is wider in scope than what positive law (or, man - made law) demands. However, some religions, like Islam, include legal rules similar in content and purposes to those

of any positive system of law, Thus, when such rules are followed, religio - legal provisions become part of the legal system, as is the case in most Islamic countries with regard to the law of personal status.

More over, law and morality are interrelated and interact upon one another in a highly complex way. The reason why There is a broad territory common to law and morality is explained by the fact that both are concerned to impose certain standards of conduct without which society would hardly survive. In many of these standards, law and morality reinforce and supplement each other as part of the fabric of life. But there remains always the possibility of serious divergency between the duty imposed by law and morality in a given situation. Three attitudes may be adopted to wards the possibility of such divergency:

1 - It may be said that law and morals must necessarily coincide, either because the moral law dictates the actual content of human law, or alternatively, because morality itself is merely what the law lays down.

2 - It may be recognized that man - made law and the moral law each enjoys a realm of its own, but that the moral law is the higher and thus provides the basis for the validity of man - made law.

3 - It may be thought feasible to treat the spheres of law and morality as exclusive, so that neither can resolve questions of validity save in its own shpre.

Be that as it may, distinct differences between law and morals exist, from the point of view or scope, sanction, and purpose. The scope of the law is the narrow one of the duty of man towards man and society, whereas the field of morals is the wider one of man's duty towards God, himself, and others, Encroachments upon the law raise a

positive sanction enforced by the State, while rules of morality have a social sanction, Finally, law aims at keeping order in society and attaining legal justice within it; morals looks towards ideal ends pushing man towards perfection.

3 - The Necessity of law

When we assert that law either is, or is not, necessary to man, we are clearly engaged in a process of evaluation. Implicit in this process is the assumption as to man's purposes, as to what is good for man, and what he needs for the attainment of those objectives.

Undoubtedly, it is because of man's pre - occupation with such issues that thinkers of all ages and societies have been drawn in to the dispute about the ethical quality of man's nature. whether or not such a dispute makes sense, it is the major premise leading to the deduction whether, or to what extent, law is necessary.

For those who see in man either the incarnation of evil or at best a mixture of good and bad impulses constantly in conflict, law is the indispensible restraint upon the forces of evil. On the other hand, those who view man's nature as inherently good look for some fundamental defect in man's social environment as the true cause of the evils which afflict him. So, the government of the reigning powers and the legal system through which they exert their political authority, being the most conspicuous features of man's environment, become the centre of criticism.

The idea of vice and corruption as the reason for the establishment of coercive institutions became a key feature of western thought for many centuries, adapted as it was by the early Church Fathers to the Judaeo - Christian version of the Fall of Man. This theory of law and government attained its classic restatement in the writings of Au-

gustine. State - law and coercion were not in them selves sinful but were part of the divine order as a means of restraining human vices due to sin. Augustine's assertion that law was a natural necessity to curb man's sinful nature held the field for many centuries, Never theless, he also provided on important basis for the later secular view of law as a means for setting man upon the path of social harmony and welfare. Thus, in this way, law came to be envisaged as a positive instrument for realizing those goals towards which man's good or social impulses tend to direct him.

Yet, in all ages there have been thinkers who have utterly rejected this approach to the coercive forces of law and order. For them, man's nature is, and remains, basically good, but it is the social environment which is responsible for man's condition, and above all, the existence of of law imposed by force from above. This is the «anarchist» viewpoint. Plato in his «Republic» puts his faith in a system of education which will not only produce adequate rulers but will also serve to condition the rest of the population. But, despite the support which can be given to Plato's belief from modern experience, the question still remains as to the system of education which can provide the best road to wisdom.

The modern perlod from the seventeenth century onwads, marked by the rise of science and technology, by the ideology of human progress, the notion that the social evolution of man could be left to the free play of economic forces (laissez faire), carried with it the doctrine that government and law were in principle evil in so far as they constricted or distorted the natural development of the economy and soclety.

The nineteenth century represented, perhaps, the heyday of the more sophisticated anarchist writers, like Godwin, Bakunin. Kropot-

kin, and Tolstoy. Perhaps the most remarkable of the theses of the modern anarchists, and certainly the most influential, is that of Karl marx. But it seems incontestable that the introduction of Marxist socialism has so far entailed more and more law and legal repression rather than its abolition.

Man may well possess innate tendencies towards what we call «goodness», namely those relationships which arise out of sympathy and cooperation, for without those all social life would be impossible. But there is also a dynamic side to human nature, which may be directed to either creative or destructive ends. The recognition that even in the simpiest form of society some system of rules is necessary seems almost in evitable. In any society, whether primitive or complex, it will be necessary to have rules which lay down the conditions under which men and women may mate and live together; rules governing family relation ships; conditions under which economic and food - gathering or hunting activities are to be organised; and the exclusion of acts which ar regarded as inimical to the welfare of the family, or of larger groups such as the tribe or the whole community. The idea that human society, on whatever level, could even conceivably exist on the basis that each individual should simply do what he thinks right in the particular circumstances would not only mean a society without order, but also the very negation of society itself.

4 - Law and seciety

Law is one of the institutions which are central to the social nature of man and without which he would be a very different creature. However. the role of law in setting order into society has been differently conceived by various thinkers.

During the eigtheenth and nineteenth centuries, the relgning

though was that of «individualism». Individualist thought assumed, then a more distinctly economic pattern. With the full impact of the industrial revolution and the growth or capitalist enterprise individualism became more than a philoophical or psychological tenet: it developed into a political and economic slogan in the form of «laissez faire». During much of that period and indeed continning into the present century, the assumption that law should interfere as little as possible with individual freedom of acuon and specially economic action, underlay a good deel of lagal and accial speculation.

But however influential were the forces of laissez faire they were in fact fighting a losing battle against another philosophy which insisted on the value of social welfare and the necessity of legislative intervention to create the indispensible conditions for attaining this. The opponents of individualism, that is to say the soclal list's, put their emphasis upon increasing the sum of human happiness. Socialism provided a philosophy adapted to improving the material welfare of society as a whole. It therefore, appealed to the progressive - minded, and seemed to afford a straight for ward justification for social and welfare legislation on a wide scale.

As will appear from the inqutry in to the nature of law in the following chapter, both the natural law school and their opponents, the positivists, were heavily influenced by an individualist approach to human scoiety. On the other hand, schools of legal thought which concentrate the attention, not upon law as a set of logical rules, but upon the end of law, and its function as a means of social engineering, are influenced by a socialist ideology.

II
THE NATURE Of LAW

The definition of law which has been adopted in the previous chapter is a general one. It has been postulated merely for the purpose of formulating a starting - point in the discussion of the more inclusive question of the nature of law.

Normally, a definition of law is influencd by the special point of view of citizens, lawyers or jurists, that is, by the view taken about the nature of law. this is highlighted by the fact that in any definition, one can easily detect an emphasis upon one element which represents the particular type of thought from which the definition is formulated.

As a matter of fact, the subject is a comlepx one. Nowhere in the realm of jurisprudence can a student of law find strong connections with philosophy, ethics, sociology, psychology, or economics. A large amount of material has been written. It would be a fantastic, and indeed a well - high impossible, task for a guide book in jurisprudence to give full answers to all the questions which have baffled profound thinkers of many nations for centuries. For our purpose is a modest one; it entails a brief and simple reference to the views of the main and more important juristic views which have, in one way or another, influenced the development of law.

1 - The Islamic concept of law

The religion of Islam has the character of jural order which regulates the life and thoughts of the beliver according to an ideal set of revelations communicated ot Muhammed, the last of the Prophets.

Thus, Islam established its own order of right and wrong, embodying its own justice, as the correct and valid one.

In Islamic legal theory, only God, as source of ultimate authority has knowledge of the perfect law. This law, the «divine» law, originally embodied embodied in the Qura'an exists in a heavenly book.

In the same way as "natural law" was regarded in the west as the ideal legal system consisting of the general maxims of right and justice, so Islamic law" is in the eyes of a Muslim the ideal legal system. As a «divine law» it is regarded as the perfect, eternal and just law, designed for all time and characterized by universal application to all men. The ideal life is the life of strict conformity with this law.

In muslim legal theory, the divine law preceded both society and State. The State existed for the purpose of enforcing the law. But if the State fails to enforce the law,, in which case the State obviously forfeits its raison dêtre, the believer still remains under the obligation to observe the law even in the absence of anyone to enforce it. The sanction of the law, wich is distict from the law is to provide for the believer the right path (Sharia), or the standard life, regardless of the existence of the proper authority charged with its enforcement.

Law in Islam exists independently of man's own existence. The norms of the law have been revealed to AllahÏs Apostle. (GodÏs prophet). The divine law rationalizes a world in wich Prophet Muhammad found chaos and conflict. The law provides guidance not only in establishing an ordered society, but also in distinguishing between "husn" (beauty), hence to be followed, and "qubh" (ugliness), which should be avoided — or, in Western terminology, distinguishing between the "good" and "evil".

The Muslim jurists - theologians assert that the basic principle is liberty; but this principle is qualified by another, that human nature is

essentially weak and can easily be led astray unless guided by divine wisdom. So, the divine law is a set of all embracing commands, it is both " authoritarian" and "totalitarian" in nature. For it includes dogma as well as social and political principles these are combined to constitute and indivisible unity. law, thus, has the character of a religious obligation: at the same time, it provides a political sanction of religion.

Three fundamental characteristics of the law may be stated on which the classical Muslim jurists seem to have agreed:

1 - The permanent validity of the law regardless of time and place.

2 - The law takes in to consideration primarily the common interests of the community and its ethical standards, the personal interests of the individual believers are protected only in so far as they conform to the common interests of Islam.

3 - The law must be observed with sincerity and good faith.

2 - Natural law

The evolution of natural law begins with ancient Greek philosophy. In essence the theory of natural law is concerned with two fundamental problems: what is the permanent underlying basis of law? and what is its relationship to justice?

Dominating all theories of natural law is the idea that law is an essential foundation for life in society. It is based on the needs of man as a reasonable being and not on the arbitrary wishes of a ruler.

The Greeks. The Greeks traditionally regarded law as being closely related both to justice and ethics. But the legal systems of the world are diverse, and so where can we find the permanent element of law?

Plato's «Republic» clearly stands as a constructive attempt to discover the basis of justice. According to him, the execution of justice was to be given to philosophers - kings whose education and wisdom was such that they did not need to be controlled by a higher law Consequently, the necessity for law in the sense of a body of binding propositions has some what been left without enough emphasis.

Aristotle, on the other hand, formulated more carefully the theory of justice. To him, justice meant either what is lawful, or what is fair and equal. He divided justice in to «distributive» and «remedial» justice. Distributive justice deals with the distribution of honour and wealth among the citizens. When remedial justice is at work, the law looks to the nature of the injury, and attempts to restore the equality that existed before the wrong. A just action is the condition between acting unjustly and being unjustly treated. Aristotle also made the useful distinction between natural justice, which is universal, and conventional justice; Which binds only because it was decreed by a particular authority. Thus, it is a precept of natural justice to return what has been lent. but it is conventional justice that determines the period of prescription.

The stoics proclaimed and popuiarized the maxim «live according to nature». A thing was said to be in accord with nature when it was governed by its own leading principle. In the case of man the leading principle is «reason». To them, the universe itself was governed by a reason similar to that governing man Hence, he who based his life on reason can face the world with confidence, for a universe based on reason could not be hostile to him. The Stoics, thus, erected a popular theory of the unity of life out of the deeper elements of Greek thought.

The Romans. Roman classical writers used the Stoic theory as an

ornament to their texts. As the Roman texts were the basis for legal studies for many centuries. it is not surprising that a theory of natural law became established.

The famous Roman jurist Gaius divides every system of positive law into two parts: changeable ruies, because they depend on men's will, and universally accepted and immutable rules, since they depond on reason. Natural law (ius naturale) was the fundamental basis of every system. Rules based on nature are beyond the power of man, how ever much conventional law may change.

Roman terminology, how ever, became confused. The praetor peregrinus evolved certain rules to be applied to transactions to which the «ius civile» (the ancient customary rules of Rome, which developed in to a system of law applicable to Romans only) did not apply, because one of the parties was a foreigner. The body of law developed by the «praetor» was given the name «ius gentium» (law of nations), which normally had the broader meaning of the actual common practice of mankind Presumptively, what was universally adopted by men was reasonable. Hence it was thought. that the rules of «ius gentium» were in accord with natural law. It can be easily concluded, therefore, that in Roman thought there was an approximation between:

1 - ius naturale the philosophic theory of the fundamental element of the law of mankind, and

2 - ius gentium, which was used in a twofold way to mean:

a - the actual common practice of mankind and.

b - the rules evolved by the practor peregrinus for the use of foreigners.

The Christian Fathers. The Christian Fathers extended the authority of natural law by ascribing to it a divine origin, The early writers, however treated the State as unnatural. This illustrates, the

great difference between the theory of the Christian Fathers and Aristotle who treated the State as a natural result of the social tendencies in man's nature.

The middle Ages The theory of natural law was so popular in the middle Ages for reasons of conservatism and liberalism, of religion and of practical convenience.

Men sought for a law based on some thing more enduring than the wills of men, a law providing unity in the face of chaos, and an element of protection against the aribtrary will of sovereign. Natural law, also satished the spirit of conservatism because of its long history, and it could also be made to satisfy the demands of liberalism, because no one knew exactly what it was. The theory moreover, satisfied the man of religion, for God had revealed the truths on which natural law was based, Now the infusion in to the theory of many of the actual rules of Roman law was bearing fruit.

In this period we find the germ of theories that later became of greet practical importance. Writers evolved the theory of social contrant by which they justified the power of the State. The predominant view among the many varieties of this doctrine was that the monarch was above positive law, but bound by natural law, This is directly against the Roman view that natural law is the immuteble and the universal part of civil law.

Among the writers, St. Thomas Aquinas (1225 - 1274) is the most signifecant figure. In his teachings, natural law provides the ultimate end, while positive law directs a certain course of action after considering all the circumstances. Natural law binds the conscience: positive law binds because of a sanction, and if positive law is just, it also binds the conscience.

The seventeenth century. The seventeenth century shows many

important thinkers of the natural law theory. Grotius (1584 - 1645). the father of the modern science of international law, believed that natural law is based on the nature of man and his need of living in a society. To discover natural law rules we must see what agress with the national and soclal nature of man. Then we must test our conclusions by seeing whether the rule has been adopted by all nations, or at least the most civilized. Human nature, in Grotius, thought makes us desire society and hence creates natural law. which in its turn recognizes contracts as valid. Thus the social contract which man should obey is sanctified. Consequently, natural law was, according to Grotius, an outgrowth of the impelling desire of man for society.

Hobbes (1588 - 1679) on the other hand, tried to build a theory on an anticipation of the findings of realism and empirical paychology. Distressed by the civil war, he wished to show that the true course lay in admitting the power of the State. The law of nature was in his conception, a general rule found out by reason, by which man was forbidden to do what is destructive of his life, or what takes away the means for preserving it. The only way to secure order was to reduce the warring will of man by the imposition of a super - will which could command obedience. The sovereign was the only source of law, was above it, and alone had the power to change it. Hobbes, moreover emphasized that law derived its authority from politically organised society. He did not ignore ethics, for he admitted the ultimate force of ethical rules. But he sharply distinguished the shpere of ethics from that of law. To him law existed whether just or unjust, because it was laid down by the State. But the foundation of the State is based, in Hobbes view, on the agreement of men. This shows the influence of the theory of social contract even on a thinker who believed in absolutism.

Locke, aimed at proving that the government must necessarily be limited, Like Grotius he believed that the moral rules could be easily discovered through reason. Locke agrees with Hobbes that the organization of the State is essential, but the difference lies in the fact that the surrender of liberty to the sovereign is not absolute but conditional.

The Eighteenth Century. In the eighteenth century, the theory of natural rights became the means for enforcing revolutionary activity. The doctrine arose that there were certain innate rights, arising from the very nature of man, which were beyond the encroachments of positive law. On the whole, theories of natural rights tended to be individualistic in character. Economically, individualism was favoured by the rising middle class. By the French Revolution, the middle class finally took control, and thus, impressed the theories of the philosopher with a bourgeois stamp .The middle classes having won freedom, did not desire that freedom to be hindered by restraints imposed in the interests of labouring classes. In such a way the doctrine of natural rights has had a great influence in America. But times have changed. What has once been the cry of the revolutionary is now the child of the conservative.

Natural law with a variable content. The revolutionary character of natural law for a time led to the disappearance ot the doctrine from official teaching. The actual thesis of the Historical shool, (to be discussed later) which largely superseded the theory of natural law, was that it is impossible to determine the content of law a priori, for law is relative to time and place and is a peculiar product of each nation's culture. Hence, to deal with the question of the rational and moral bases of law, new theories of natural law have had to be formulated.

Instead of searching for immutable rules, thinkers have attempted to find an ideal standard or principle which will give direction to law. and also be capable of adaptation to different circumstances. Thus, the phrase «Natural law with a variable content» has arisen. The most important figure of the modern school of natural law is stammler, who seeks for the a priori form of law and of justice. He distinguishes between the «purpose of law» and the «idea of justice». The modern theory of natural law is closely associated with the idea of «justice», which means that a law could, or could not, be just.

In addition to stammler, one can trace a basic influence of the new natural law trend in the teachings of kelson, kohler, Geny and Heinrich Roman

3 - The Imperative shcool

The English jurist John Austin is the founder of this school, for which the title «imperative» is more appropriate than the more popular one «Analytical», because it emphasizes Austin's particular conception of law.

Austin defines law by saying: «A law in the most general and comprehensive accepiation in which the term, in its literal meaning. is employed may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having powerover him» His broad approach to law was to regard it as the command of the sovereign. Positive law is a general rule of conduct laid down by a political superior to a political inferior. The notion of command requires the existence of some determinate authority to issue the command, and that there is an implied threat of a sanction if the command is not obeyed.

Austin believed that the chief method of jurisprudence was analy-

sis. Some of his followers seem to believe that all legal problems can be answered by analysis of the rules that exist and by deductions from them. What is clear is that the analytical system did not umphasize suificiently the craative element in law and tended to magnify the static character of legal rules.

From the definition of law which Austin formulated it could be inferred that his aim was to separate sharply rules of law from those social rules such as custom and morality. Many of his followers ignored the study of the latter rules and did not deny that they only studeid the facts The end of jurisprudence was the study of law «that is» and not the law that «ought to be. Unconsciously the analysis saw as the supreme purpose of law an ideal of logical harmony. Clearly, how ever, law does not exist merely for the sake of logical consistency, for public policy may justify the existence of certain rules the presence of which within the legal system is illogical.

What has been said brings to light three significant points.

1 - If law is the command of a superior sovereign, then its existence is closely associated with the foundation of the State. There fore, all the rules recognised by tribal communities, whether of antiquity or modern times, are not rules of law, since there is no State. But no modern lawyer can agree with this conclusion, because law is a living being for social control, irrespective of the existence of the State.

2 - The notion that law is a «command» only drives out from the conception of law a large body of rules which cannot be described as a command or injunction. Much of the law is merely permissive. Thus, the law permits a person to make a will. Also, the rules of procedure have no application unless a man first chooses to start an action in a court and before such an action is brought, no one can claim that such rules are not rules of law.

3 - The emphasis placed upon the element of «sanction», implicit in the Austinian definition of law makes international law and constitutional law fail to comply with the description of law properly so - called. Although this may reasonably apply to international law, because of the non - existence of a law enforcing agency in the international arena, there exist in the majority of modern States some constitutional sanctions for violations of the constitution[1].

4 - The Historical shcool

The Historical school considered law in direct relation ship with the life of the community. The school was in part a result of the surge of nationalism that arose at the end of the eighteenth Century. In 1814 the German jurist savigny enunciated a programme for the school, at a time when writers began to emphasize the spirit of the people (Volksgeist), instead of the individual.

According to the teachings of this school, law can never be understood unless it is studied as a growth and its history made to explain its present condition. The law of one generation is the product of the generation that preceded it. Changing conditions of life modify the law from one generation to another.

Law is not the command of the sovereign, not even the habits of a community, but the instinctive sense of right possessed by every

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(1) The French Exegetical School (Ecole de L'exégese), which appeared during the Napoleonic poriod, shared with the English Imperative school the notion that the legislature is the sole source of law. The school emphasized that every lawyer should stick to the actual provisions of the codes and utmost care must be paid to the intention of the legislature. The School, is therefore, formal and reluctant to analyse the nature of law in a deep philosophical manner.

race. Custom may be evidence of law, but its real source lies deeper in the minds of men. Every member of the community has an instinctive sense as to what is right and proper in matters with which he is directly concerned. This approach naturally led to a distrust of any deliberate attempt to reform the law. Legislation can succeed only if it is in harmony with the internal convictions of the race to which it is addressed. If it goes farther, it is doomed to failure.

In savigny's own writings. however, there are some exaggerations. Firstly, some customs are not based on the instinctive sense of right of the community, but on the interests of a minority class, for example, slavery. Secondly, some of the law is the result of conscious effort, such as modern trade - union law. Thirdly, imitation plays a greater role than the historical School would admits. A strong example is the movement of codification that followed the Code Napoleon.

A side from these exaggerations, the chief and most important contribution of the historical School to juris prudence is its emphasis on the idea that law connot be understood in isolation of its social milieu. This is the foundation on which the modern Sociological School has been built.

5 - The social Solidarity School

The School is associated with the name of the French jurist Duguit. The theory of this School criticised all doctrine that attempted to define the nature of law on abstract and metaphysical bases, and most of the prevalent legal notions, such as the ideas of soverneignty, right, and legal personality.

Duguit stresses the fact that man has always existed in a society In this, he agrees with almost all thinkers who preceded him. But the new thing in his theory is that in society. man lived in a State of com-

plete solidarity. Social solidarity originated first among members of the family, and in time, it extended to include the city or the tribe. then to the nation, and the future might show us a solidarity of humanity at large with all its nations.

The doctrine of solidarity is urged to show that the jurat principle (al regle de droit) does not rest on the metaphysical and selfcontradictory conception of rights of individuals anterior to society. but is directly derived from the same elements which constitute. the social bond. In Duguit's opinion, there are two elements in every society which together constitute the social bond. Although these two elements may appear in a variety of forms, but the basis of which is always the same. They are:

1 - The similarity of needs, which is the basis of solidarity either through mechanical interdependence or through similitude.

2 - the difference in needs and aptitudes which produces and makes necessary an exchange of services, and which founds solidarity either by organic interdependence or by division of labour.

The jural principle (la regle de droit) says: Do such a thing because it is social; refrain from such and such a thing because it is anti - social, A juridical obligation is not to do what has a social value, that is not to do what is anti - social. It finds its proof in the fact that the whole world agrees in recognizing that the criterion of the jural principle is the social reaction which is caused by a violation of the principle, a reaction of being socially organized.

6 - Law As Means To An End School

The founder of this School is the German jurist Rodolf von Jhering, who urged that law is an instrument for serving the needs of human society. In society there is an inevitable confict between the social

interests of man and each individual's selfish interests. To reconcile this conflict, the State employs both the method of reward, by enabling economic wants to be satisfied and also the menthod of coercion. There may be unrecognised coercion, as is the case of social conventions or etiquette, but law is specifically that form of coercion which is organized by the State.

Jhering did not deny the existence of altruistic impluses. but recognized that these would suffice without the coercive form of social control provided by law. The success of the legal process was to be measured by the degree to which it achieved a proper balance between competing social and individual interests.

7 - the Pure science of law school

The Founder of this School is the Austrian jurist kelsen. His thoughts represent a reaction against the modern schools which have widened the boundaries of jurisprudence to such an extent that they seem conterminous with those of the social sciences.

Admittedly, kelsen builds on kant, and wishes to free the law from metaphysical mist with which it has been covered at all times, by the speculation on justice or by the doctrine of natural law. He desires to create a pure science of law, stripped of all irrelevant material, and to separate jurisprudence from the social aciences as rigorously as did the anslyst.

kelsen wishes to separate jurisprudence from the realm of natural science. The latter deals with cause and effect, while the former does not attempt to describe what occurs but rather prescribe certain rules, to lay down standards of action which men ought to follow. A legal system exists in order to impose obligatins on certain individuals. To

know whether in a particular case an obligation exists, we ask whether the individual, if he disobeys a rule, would suffer a sanction. But kelsen does not take Austin's step of defining law as the command of the sovereign. Law and the State are really the same thing envisaged from different aspects. A legal order becomes a State when it has developed organs for the creation, declaration, and enforcement of law.

When we look at the abstract rules we think of the legal order. when we examine the institutions by which law is put in to effect we think of the State. But this is merely looking at the same thing from two angles.

But, by what criferion can we distinguish a rule of law? Not by their content, because law may cover any topic; not in terms of justice, because «justice is an irrational ideal», but in the way a rule of law is created. According to kelsen, we must trace every legal act back to a norm which imputes legal validity to certain human behaviour. Thus, the imprisonment of (X) is justified because of the sentence of a criminal court: the court had this power because of the criminal code: the criminal code has legal effect because it was enacted by the appropriate legislative body. which is granted power to legislate by the constitution. But if the whole communtiy unaninously agrees to accept a particular constitution, that agreement had no legal force For, until a constitution is adopted, the methods by which law is to be created are not laid down juisprudence must posit an initial hypothesis beyond which it cannot go. To determine what is to be the initial hypothesis for any country we must go beyond jurisprudence, examine the world of reality, and discover an hypothesis that has some measure of correspondence with the facts, and not an absolute correspondence.

The legal order is, there fore, a heirarchy of norms, the validity of each norm depending on its being laid down in accordance with a

superior norm until we reach the initial hypothesis which jurisprudence can only accept and cannot hope to prove. The initial hypothesis is abstract, but as we descend down the ladder the norms gradually become more concrete until we reach the final norm which imposes an obligation on a particular individual, either by the judgment of a court, the order of an administrative officer, or the making of a contract between two citizens.

In Kelsen's theory, the subject matter of jurisprudence is the legal norm emptied of all practical content. all questions of ethics or social philosophy. By this method, an impartial and universal science is really created. But at the same time, we are left with the dry bones of the law deprived of the flesh and blood which give them life, The value of kelsen's work is represented by it critical force, by showing that law is a weapon that may be used to effect many ends, and by its emphasis upon the judge's discretion in executing the norms of law. But by excluding all discussion of natural law the science of law is left very «pure» and deprived of all interesting contact with life itself. Indeed we cannot obtain from this method theory of legal development, but simply the formal principles of juristic thought. The exclusion of sociology and ethics leaves jurisprudence as a normal exercise in abstract notions. If the premisses of Kelsens theory are rigidly followed, the result is too formal; if the jurist goes beyond the premisses, the method is destroyed. Jurisprudence should be made to go be yond the formal heirarchy of norms to study the social forces that create law. Despite the abuses of the natural law doctrine, the whole question of ethics cannot lightly be ignored. Indeed, kelsen him self bases his view in discussing the nature of international law on the legal unity of the world, which is, after all, an ideal. The aim of the pure sclence of law theory is a narrow one, and it must be complemented by other and broader approaches.

8 - The sociological jurisprudence school

The late Dean Roscoe Pound is usually credited as being the American leader of the sociological jurisprudence school. The fundamental tenet of this School is that we cannot understand what a thing is unless we study what it does.

According to Pound, contrary to Kelsen, the values that direct the development of law must be analysed throughly in order to understand legal development. He considers the appreciation of legal development the key to understand the nature of law. Pound thinks that law is more than a set of abstract norms or a legal order. It is also a process of balancing conflicting interests and securing the satisfaction of the maximum of wants with the minimum of friction. The jurist is urged by Pound to study the actual social effects of legal institutions and endeavour to make legal rules really effective for the purpose for which they were designed. Law in action may by very different from law in books.

What, however, is the criterion that should be applied in reaching a compromise between conflicting interests? Pound's view is essentially relativistic. He emphasizes that the jurist as such cannot determine the ends which law should pursue, but can only lentatively effect compromises valid for his time and generation, because they are based not on absolute ideals, but the views held by that particular community at the moment.

9 - the Reaslist school

The sociological and the reslist are two wings of one School which may be termed the «Functional School». In this case, the realist School represents the left wing of the functional school.

The realists trace their intellectual ancestry to Justice Holmes the famous American judge. Holmes and Pound have given due weight

both to logical structure of the law and the influence of social forces.

The realists emphasize the element of uncertainly in law and the part played by the personal characteristics of the judge. Law is defined not as a set of logical propositions but in terms of official action. Law is what courts (or other officials) do not what they «say». Until a court has passed on certain facts there is no law on the subject yet in existence, for the opinion of lawyers is only a guess as to what the courts will decide. Since law is defined in terms of official action (and not of the rules which should guide action) it follows that any force that will influence a judge in reaching a decision (whether corruption, indigestion, or partiality for the other sex) is a fit subject for jurisprudence. The formal rules of law can have little weight in legal evolution - any rule is unsatisfactory because human relationships are too numerous and complex to be confined within a formula, because society is always changing moral judgments are developing, and the law is there fore in a State of flux.

Followers of this School almost universally agree in rejecting or at least in being suspicious of, any a priori logic and in accepting an instrumental logic, They were pragmatists. However their particular interests took them off in widely divergent directions. Some, like W. U. Moore, H. Oliphant, and perhaps. W. O. Douglas, approached law as a social science and attempted to investigate the facts and decisions and consequences fo legal activities, and so, by statistical methods, to produce new and objective criteria vaiid for prediction on the one hand and evaluation on the other. Others made the main object of their attack the indeterminancy of language and the impossibility of providing certainly in particular official action by the framing of general rules. Others, still, concentrated upon the search for the real factors which control judicial decisions after assuming, or demonstrating, that the authoritative rules of law pronounced by judges as reasons for

their decisions did not, in fact control but were more in the nature of rationalizations made after a decision had been reached on other grounds. K. N. Llewellyn concentrated rather on the uncertainly in the actual operation of the rules in the appellate courts. W. W. Cook submitted the rules of private international law to an incisive analysis which showed that what appeared on a superficial glance to be certain was full of inherent ambiguity.

The realists insisted that to know what a thing is, one must see what it does; that rules of law must be assessed by reference to their consequences. They saw law as but one method of social control and hence they argued that it could not, be understood or developed rationally without understanding its relationship with disciplines concerned with humanity and societies - politics, psychology, economics, sociology, and anthropology.

Be that as it may, now that the dust of earlier conflicts has settled; there seems to be less difference between the right (sociological jurisprudence school) and the left (realist school) wings of the Functional School than was formerly supposed. Both emphasize that the jurist must study the functioning of law in society: a realistic examination of the judicial process is obviously a part of such an approach. Inevitably, however, differences of emphasis will arise between various writers.

10 - Sociology of law

Pound's sociological jurisprudence should be distinguished from what is now known as the «sociology of law». Confusion would be saved if Pound's School is termed the «Functional School».

Sociology of law is defined in many ways, but its main difference from functional jurisprudence is that it attempts to create a science of

social life as a whole and cover a great part of sociololgy and political science. The emphasis of the study is on society and law as a mere manifestation, whereas Pound rather concentrates on law and considers society in realtion to it.

Thus, Ehrlich (1826 - 1920) builds on the foundations laid down by Savigny a board theory that law depends on popular acceptance and that each group creates its own living law which alone has creative force. All that the judge does is to make precise and definite the raw material thus furnished by the community. Hence, to understand the legal life of a community the jurist must supplement his study of the code or decisions of law of a time by an analysis of the facts. According to Ehrlich the real law consists not of propositions but of legal institutions created by the life of the groups within society - hence the importance of studying the factual institutions that create law. He considers that the jurist should study the factory. the bank the railroad the great landed estate, the labour union, The association of employers, and a thousand other forms of life. Rather breathlessly, one wonders if a life time would be enough to deal with one industry.

Huntington Cairns also attempts to ereate a legal science with dominant emphasis on sociology. Jurispruderce is seen by him as the technology of law. No universal propositions can be laid down concerning legal concepts or rules because they differ from race to race. If jurisprudence wishes to become seientific, it must create a science of society. It impossible to discover how law operates unless we have greater knowledge of the factors that cause change in society and govern its evolution. When this is understood. jurisprudence as a technology can apply these rules to reach useful results.

III
SOURCES OF LAW

The term «sources» is here used to connote those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform, and above all, compulsory. In other words, a source of law is any fact which in accordance with the law determines the judicial recognition and acceptance of any new rule as having the force of law.

The word «source» as applied to law has many meanings, and is a frequent cause of error. Some writers distinguish between two kinds of sources, «legal» and «Historical», Legal sources are those recognised as such by the law itself, as when we say that the applicable rule is such and such an article of the Iraqi Civil Code No. 40, 1951. Historical sources are those which are such in fact, but are nevertheless destitute of legal recognition. Thus the provision of a certain article of the Code might have been the opinion of the Chairman of the Drafting Committee, al Sanhouri, who. in trun might have been influenced in his view by th opinion of his French professor, lambertwho again might have been influenced by a rule of a certain foreign law, In this case, the historical source of the Iraqi article becomes represented by the opinions of al - Sanhouri, and Lambert, and the provision of the foreign law.

This division of sources, and indeed any division, can be criticised on the basis that a source is either a source of law in the actual sense of the term, or not, However, the division set out above is helpful to

the novice in law in so far as it assists him to distinguish between what is enforceable as a rule of law, and what has been the basic material which leads to the formulation of what is enforceable.

How ever, in view of the definition of the term «sources» adopted above, we can determint the important sources of law generally as follows:

1 - Religion.

2 - Custom.

3 - Equity.

4 - Judicial Decisiuns.

5 - Juristie opinions.

6 - Legislation.

From the point of view of Iraqi law, not all of these sources are delevant. Thus, Article (1) of the Iraqi Civil Code states the «authoritative» sources of Iraqi law, that is those allowed by the courts as of right, to be legislation, customs, religion as represented by Islamic law, and equity. Judicial precedents and juristic opinions are authoritative in all this only as a guide for enforcing or rejecting a particular application of a rule derived from the previously mentioned sources.

However, all sources of law merit some discussion, This will be done briefly in the following sections, according to the general enumeration formerly set out.

1 - RELIGION

In the coneption of Islam, religions are either «divine». that is revealed unto a prophet, such as the religions of Islam, Christianity, and Judeism, or «non - divine», which include positive religions founded

by social reformers in a way not revealed by God, like Bodhism, Zoroasstrianism, and all the various forms of Pagan religions.

Whether divine or not, religions differ in the extent of regulating matters that lie within the domain of law as we understand it nowadays. This can easily be shown from contrasting Islam and Christianity, the two important religions in this country.

In Islam law and religion are strongly interwoven one with another.. Islamic law is founded upon the revelations of the Prophet as recorded in the Quran supplemented by the Sunna (Traditions of the prophet, his spoken words and action). Al - Ijma' (consensus of opinion) and al - Qiyas (reasoning by analogy) are the third and fourth sources of Islamic law. Despite the differences of Islamic jurists in this connection, and whatever the present application of Islamic law may be, one fact is clear. It is that Islam does not only include matters of purely religious flavour that is, regulating the relationship of the individual to God, such as prayers, fasting, piligrimage and the like - but also legal rules for the regulation of human conduct between the individuals themselves. Such are the rules regulating marriage, divorce, inheritance, civil transactions, crimes, matters of public law, such as the doctrine of government and state, and the principles to be observed in international relations, Thus, it is indeed justifiable to designate Islam as being «a religion and a State».

In Christendom, law does not find its source in religion. The Christian has not as such a peculiar law, for the founder of the Christian Faith did not, like the Prophet, establish a State and give laws to his followers. He confined himself to laying down moral principles and teaching spiritual doctrines. Thus there does not exist any body of Christian law in the same sense that there exists a law for Muslims of a professedly religious origin. The Christian States of Modern Europe

have inherited the traditions of the Roman Empire in this respect. In that Empire, the spread of Christianity did not disturb the existing law, except so far as its moral influence tended to affect legislation. So, law remained secular in Eurpean countries, existing independently of religious obligation, and its authority rests upon the power of the State. Indeed, certain secular provisions of Eurpean law (e. g, in marriage and divorce) may be traced back to a Christian religious origin. But this fact may be explained on the basis that these provisions have arisen not from the existence of any specifically religious law which all Christians are bound to obey, but from the growth of the ecclesiastical power of the Church which enabled it to extend its jurisdiction and enforce the Canon law at the expense of the State and State law.

The central and remaining question to be considered is: What parts of Iraqi law are directly governed by Islamic law and the rules followed by other religious monorities?

From a historical view point, Iraq after its independence, inherited from the Ottoman Empire a dual legal system. We see, on one side, laws derived from Western sources, and on the other laws of purely Islamic origin. The legal field over which Islamic law dominates is that of «Personal Status». This is governed by the Law of Personal Status No. 188, 1959, as amended by the law No. 11, 1963. Matters of personal status include those of marriage, divorce, separation legitimacy, alimony, inheritance (testate, and intestate), and guardianship. In addition, the institution of «waqf» is also governed by Islamic law, for, after all, it is purely Islamic. More over, a most important event in the history or the Iraqi legal system is that the Civil Code No. 40, 1951, has recogrised Islamic law as the third source of law after legislation and custom. In fact, there are numerous Islamic provisions in the Code, co - existing alongside those derived from Western sources.

A side from the religion of Islam, other religions, too, are sources of law in the sense we are considering. The Proclamation of the Commander of the British forces of Occupation of December 28, 1917, and the repealed Iraqi constitution of March 21, 1925 (Articles 75, 78, 79 and 80) recognised the right of Christian and Jewish minorities to refer to their own spiritual tribunals for the decision of personal status cases. Spiritual figures were relied upon for the deduction of the applicable rules, which were not known to most litigants and advocates. It was there fore, considered necessary by the Legislature to obligate those minorities in the law for the Organization of Religious courts for Christian and Jewish Minorities No. 32, 1947, to record the applicable rules and publish them under the auspices of the Ministry of justice during a specified period. Other wise, the Minister of justice was given the power to with draw the Religious courts Jurisdiction and assign it to the Civil Courts. In fact, the Jewish minority responded to the provisions of the law No. 32, 1947, but after the Palistinian war of 1948 and the withdrawal of Iraqi nationality from the majority of Iraqi jews, the jurisdiction was referred to the Civil Courts Similarly, some Christian factions published their religious rules, but others refused to do so under the pretext of difficulty and the unity of their religious teachings all over the world. In any case, however, the jurisdiction to decide cases of personal status for all Christians has been assigned to the «Court of Personal Status» which is a civil court. The applicable Law is still the same that was followed in the period prior to the law No. 32, 1947, that is to say the Proclamation of 1917 supplemented by the rules deduced by the religious heads of the minorities.

2 - CUSTOM

When we talk of custom as a source of law, we mean legal coustom. «Legal custom» is distinct from other social customs social in

that its obligatory sanction is complete and uniform.

Although custom is an important source of law in early times, its importance continuously diminishes as the legal system grows. However, it is a misunder standing of the evolution of law and the conditions of primitive societies to regard customs merely as «positive morality» until they have been expressly ratified by some determinate law - making authority. The great majority of customs are non - litiguous in origin, and their rise and observance depend on de facto conduct and repitition.

The importance of custom as a source of law is not entirely confined to the early stages of social growth; in all civilized jurisprudence it has always been recognized as greatly influencing the development of legal institutions. Roman law, though its theory in this respect was not entirely clear or consistent, attributed an important function to custom, constantly recognizing its effect both in substantive and adjective law, though assigning to it a secondary position as compared with the supreme legislative instrument of the imperial régime.

In modern jurisprudence the Historical School of Savigng found in custom the true source of all law, deriving it from the common consiousness of the people, We have seen that in the view of this School law is valid and just only in so far as it makes known and embodies in concrete forms the inherent legal instincts of the community which it purports to govern. This view needs modification, for it seems impossible to attribute all customs to general conviction among the community of their necessity. rightness, and appropriateness. Customs are often the product not of a widespread conviction but of the convenience or interest of a ruling class which imposes its will on the majority of society. Many are purely legal in origin, and many are the result of mingled influences which cannot be called peculiary popular or national.

Kinds of custom, All custom which has the force of law may be of two kinds, which are essentially distinct in their mode of operation. The first kind is «legal» custom, which is the custom operative paruse as a binding rule of law. independently of any agreement on the part of those subject to it. The second kind is conventional, custom, which is the one operating only indirectly through the medium of agreements where by it is accepted and adopted in individual instances as conventional law between the parties. The authority of the former is absolute, that of the latter is conditional on its acceptance and incorporation in agreements between the parties. In the language of English law the term custom is more commonly confined to legal custom exclusively, while conventional custom is distinguished as «usage». The distinction so drawn, how ever, between the terms «custom» and «usage», which in popular speech are synonymous, is by no means universally observed even by lawyers. In Arabic, the two terms are used interchangeably, but some writers follow Western jurists in distinguishing them. French jurists draw the distinction between «la coutume», (custom) and «lusage» (usage). The former is commom Practice regarded as the source of a rule of law, while the latter is confined to such practice as gives rise to an implication that the parties intended their relations with one another to be governed by it and have relied upon this tacit understanding with out expressing their intention in words.

Advantages and disadvantages. Custom, as a source of law, has certain advantages. These may be listed as follows:

1 - So long as the mere existence of a society, the mere plurality of individuals, give rise to customs from which no single member of the totality can completely divorce himself, it is natural to find that customs reflect the true needs of the community. Thus, it is diffecult, generally, to imagine a custom contrary to the general will of the com-

munity, while legislation, for instance, may be imposed by an absolute sovereign or a dictator.

2 - Custom is more flexible than written law, for it develops with the development of social conditions of life.

3 - Custom implements legislation, for the latter, how ever perfect it may seem, connot provide all the needed solutions for the infinitely variable needs and transactions.

Custom has its disadvantages too. Of these three may be listed:

1 - Customary rules are often ambiguous. Thus, they are difficult to determine, and often raise complex litigation.

2 - Customary rules develop very slowly, and need a long time to become established, Thus, custom may be important in the face of new circumstances. Again, once established, customs become rigid, and very difficult to change.

3 - Custom may not facilitate the evolution of complete harmony in one country due to the existence of defferent local customs. Thus, individuals in one country will be governed by different customary rules each having the force of law.

Conditions of custom. In order to be a source, custom must fulfill certain conditions.

1 - Custom must be «general», that is, it should be followed by the majority of individuals in society. The generality of custom, how ever, does not preclude the existence of either a «local custom» prevalent and having the force of law in a particular locality only, or a «particular» custom followed by a certain group of individuals in society, as for instance, members of a trade or a craft.

2 - Custom must have existed for so long a time to be of imme-

morial antiquity Recent of modern custom is of no account. Although it is difficult to fix the period sufficient for the birth of custom, it is never theless immemorial when its origin was so ancient that the beginning of it was beyond human memory, so that no testimony was available as to a time when it did not exist.

3 - Custom must be «constant», that is its observance must be continuous and unchanged Non - observance of it by some individuals, if it is confined within the exceptional limits allowed by law, does not extinguish the character of custom as a source of law.

4 - Custom should not be against the rules of «public policy» This is natural, for no rule of law is allowed application if such contravenes the fundamental principles of life and morality in society.

5 - Custom should not run counter to the written provision of the law. Once there is a legislative rule of law, resort to custom is not allowed.

6 - Custom must have been observed as of right, This does not mean that custom must be acqulesced in as a matter of moral right, What the condition means is that the custom must have been followed openly, without the necessity for recourse to force, and without the permission of those adversly affected by the custom being regarded as necessary.

3 - Equity

Until recent times, when the technical elaboration of law has reached an advanced stage of development, a sharp line between the formal administration and the ethical idea of justice has not been drawn. In the growth of legal systems a conscious aspiration toward a «constant» of fairness in legal relationships has played a large part in shaping substantive rules. Equity has stood to strist law as a «supple-

mentary residuary jurisdiction». This has been necessary because legal rules are formulated generalizations and such are necessarily incomplete. So a margin of discretionary interpretation must be left.

This may take the form of equity «in general» - a general disposition towards a human and liberal interpretation of law. or «particular equity» - a discretionary modification of the strict law individual exceptional cases which are not covered by the general rule.

The popular or natural sense of justice cannot be disregarded; it has a real meaning in law, since it represents an average element in the community with which it is necessary that law should harmonize; and most of the equitable or discretionary ingredients which are constantly found in legal systems are based upon this primary sense of justice inherent in the average moral sense of the community.

Equity as a source of law may be defined as «any body of rules existing by the side of the original positive law of the country founded on distinct principles of reason, or deduced from absolute justice and claiming to supersede the positive law in virtue of a superior senctity inherent in those principies» Clearly, therefore principles of equity are strongly interwoven with the idea of natural law.

The necessity of a supplementary equitable jurisdiction was insisted upon by Greek philosophers. Equity was regarded by Plato as indispensible to any intelligent administration of justice. Aristotle holds that justice and equity are «neither absolutely the same nor generically different». This means that the difference between them is not one of kind, but of degree, and equity is the higher degree. Its function is that of a corective of legal justice, again because the universality of law cannot be universal. But in exercising this corrective function, equity must as far as possible follow the spirit of the law which it

seeks to apply benevolently, and it must do that which it is to be presumed the legislator him self would have done had he contemplated the exceptional case. Equity embodies a moral ideal, and it is constant and immulated while positive law is inevitably subject to many imperfections and inconsistencies.

Foman jurisprudence was influenced to a great measure by Gree. Philosophical ideas. It was commended and enjoined by imperial authority as a general principle of judicial interpretation and it is to be found not only as an abstraction of speculative jurisprudence, but in many substantive doctrine of the Roman system, such as the development of a doctrine of good faith in the law of contract and the discouragement of unjust enrichment.

In English law, equity has become, in the course of time, a technical system distinct from the «commom law». The common law may simply be defined as the law that is not the result of legislation that is, the law created by the cutsom of the people and decisions of the judges. This law. administered by the common law courts, became rigid, highly formal, and worked out injustice. In the Middle Ages, these courts failed to give redress in certain types of cases where redress was needed. The disappointed litigants petetioned the king, who was the «fountain of justice», for extraordinary relief. The King referred those petitions to the Chancellor, who was the chief mintster and secretary and the most learned member of the King's Council. Later, the petitions came to be addressed to the Chancellor directly. The chancellor was an ecclesiastic, commonly a bishop, and as such interested in judging the question raised by the petition on grounds of morality and conscience. Thus, «equitable relief» was rendered, while there was no such «relief at common law». In the course of time, the general principles of equity, which began as the application of moral sense to

particular cases, developed in to more and more definite, rules. In reality, there has developed a new set of rules of law (equitable rules), and a new set of rights (equitable rights). In the judicature acts of 1873 - 1875, the whole court's system has been organized, and it has been enacted that if there is a «conflict» or «variance» between the rules of equity and common law rules, the former are to prevail.

In Iraq, equity is a source of law too. We have previously referred to what article (1) of the Iraqi Civil Code provides. It obligates the Iraqi judge to deduce and apply rules and principles of equity in the decision of cases, when no applicable provision is supplied by legislation, custom, or Islamic law. If such provision is supplied the judge has no power to refuse its application on the ground that it is unjust or inequitable. For, duty of the judge is to apply the law, and not to inquire in to its justness as such.

In fact, many celebrated legal doctrines are the off spring of the application of equity. The rules governing the theory abuse of rights, and the theory of risk are nothing but an application of equity in the realm of the law.

4 - Judicial Decisions

When a judge decides a case he issues an order giving effect to his decision which is entered on the record of the court. This is a judicial decision or judgment in the strict sense, and is binding only on the parties to the case (res judicata). But the judgment will have been based on some legal principle, Is it, there fore, to be expected that the legal principles is to be applicable to all cases of a similar kind? Is it envitable that judges should to a greater or less degree follow the former decisions of them selves and their colleagues and predecessors? An affirmative answer to these two questions makes judicial decisions

a legal source of law. and so, the doctrine of the «binding force of judicial precedents» will have to occupy a prominent place in the judicial system. This is the case in England, and generally, all Anglo - Saxon legal systems. On the other hand, a negative answer to the two questions formulated above renders judicial decisions to be of a mere interpretative interest. Judicial law becomes a supplementary source of law. This is the approach of Continental legal systems, from which we shall choose the French for consideration. A reference to the English approach will be made first.

English practice. The English doctrine of binding precedents in its developed form is comparatively modern It grew up in the common law courts and was extended by analogy to courts administering equity and admiralty law. The English theory may be stated briefly as follows:

A judge, when called upon to decide a case, is obliged to follow the previous decisions which bear upon the matter in issue. He must seek to extract from the previous decisions by which he is bound the role upon which the decisions proseeded and he must apply that rule to the case before him. But he is not bound by rules laid down in the course of previous judgments except so far as they were really necessary for the decisions. thus statements of legal principles wihch were not necessary to the decision of the case that was tried, such as things said by way of explanation, illustration or analogy (known as obiter dista) are not binding. It is only the rule upon which the decisions actually depended (Known as the ratio decidendi) by which the judge is bound, It is possible that the may find in the facts of the case before him some facts which serve to distinguish it from previous similar cases and in his opinion take the case before him out of the operation

of the rules involved in the former decisions. He must weigh all the cases which seem to have some bearing upon the case before him, and the rule which he eventually applies will thenceforth have the authority attaching to his decisions, so far as it is in fact required for the decision of the case. Of course, while appearing to follow rules invoived in previous deciaions he is frequantly in fact building up new law. Little by little the results of old rules are worked out, and their operation is extended or restricted as cases arise which call for their application. So an English judge makes law in applying it, whence his work has obtained the name of «Judicial Legislation».

The English judge, how ever, is not bound equally by all previous decisions. The decisions of inferior courts are not absolutely binding upon courts of co - ordinste autority, but in the absence of strong reason to the contrary they would be followed. The decisions of the Court of Appeal and the Court of Criminal Appeal are generally binding upon the Appellate Courts them selves and upon all the courts below. Those of the House of Lords are binding on all courts in the United Kingdom and upon the House it self.

Where a precedent is «binding», the court roust follow it even though it disapproves of it. «Persuasive authority» is given, in the absence of binding precedents, to the following:

1 - Decisions of English courts which, owing to the relation between the courts as explained in the previous paragraph, are not binding on the court concerned.

2 - Obiter dicta of English courts.

3 - Decisions of Irish, Scottish, Dominion, and United States courts.

4 - Roman law, especially in the Digest of Justinian, only in the absence of direct authority.

The weight of persuasive authority is a matter of degree. Among the factors to be taken in to account in assessing the weight to be attached to persuasive precedents are:

1 - The rank of the court.

2 - the preslige of the judge.

3 - Whether it is a considered judgment.

4 - The date of the decision, which should generally be neither too old nor too recent.

5 - Whether there are many dissenting judgments.

6 - Whether there were different rationes decidendi for the same decision.

7 - Whether it was a direction to a jury, in which case the law would not usually have been fully argued.

8 - Whether the action was opposed, or the point argued by counsel.

9 - The reliability of the reporter in the case of the former private or named reports. (Quasi - official reports of cases have appeared since 1870 under the auspices of the Incorporated Council of law Reporting for England and Wales. The title of these is the law Reports, which in fact began before the incorporation in 1865).

The English doctrine has come to be applied in Australia, New Zealand, and though not quite so strictly, in Scotland and South Africa, whose legal systems are largely based on Roman law. In the United States, the Federal and State Supreme Courts do not consider

them selves bound by their own decisions, and the other Courts have tended to be more critical of precedents during the last fifty years.

French practice. In France, on the other hand, this habit of deference to previously decided cases has not grown up. The french recognise the importance of case law (la jurisprudence) as an instrument for the development of the law, but in France the influence of «la jurisprudence» has often conflicted with another current authority, the opinion of learned lawyers not on the bench (la doctrine). The judges are not allowed to develop principles of law in their judgments. They are expected to decide simply the case before them. Their judgments can only have a relative authority limited to the matter before them. They are concrete, decisions, obligatory only for the parties to the suit.

This may be contrasted with the English view which regards the decision as a deduction from some principle or general rule which by its application in the case gains judicial authority.

Then, again, the decisions of Superior Courts in France do not bind the Courts below. Even the decisions of the Court of Cassation (Cour de cassation) the highest Court of appeal on points of law, do not bind lower courts, except indeed, when it is sitting «toates Chambres réunies», that is when its various cambers or divisions (Chambre des Requites, Chambre Civil, et Chambre Crimienell) are sitting together. Even then the decisions is binding on the Courts below. and on the Court of cassation it self, only as regards the case in issue.

The French judicial system is also bostile to the development of case law. In England and Scotland judges are few in number highly paid, and chosen from the most successful and learned members of the profession and, thus, generally, men in later middle life in France, on the other hand, judges are numerous and all paid in comperison with

English and Scotish judges. They are generally quite young at the time of their appointment and have seen but few years of practice. It is natural, there fore. that the French judiciary should not have enjoyed the same veneration as a legal authority which is accorded to the judges in England, and that the theories of non - practicing lawyers who occupy chairs in the many excellent French law Schools should vie with them in reputation.

But although th authority of judicial decisions in France cannot be compared to that which is given them in England, the jurisprudence has secured a very important place among the influesses which mould the development of the law. and its importance has been steadily growing during the present Century. Particular respect is naturally paid to the decisions of the Court of Cassation, the jurisprudence of which tends to fix the varying jurisprudence of the lower courts. The members of this Court have enjoyed great experience as judges, and it is natural that their opinions should by highly esteamed. It is, indeed a fact that in a codified system of law, written provisions of the codes cannot possibly cover all the multifarious cases that may arise in practice for how ever strong the legislatures foresight may be, it is necessarily limited. Thus brightens the task of the judge in supplying rules to full the gaps of legisilation by means of analogies, extensions, distinctions and the like. In this sence, Judical decisions become an «interpretaive source of law».

Iraqi practice the Iraqi legal system stands on bases simllar in principle to those of France. It is noticeable, how ever, that the majority of decisions, even those of the highest Court in the country, often lack legal precision well - considered reasoning, and scientific legal technique. No reasonable man can deny the fact that a sophisticated judicial system with learned judiciary is a healthy sign of civilization to

be proud of: a sign that makes for stability, order, and susceptitbility for change to the better.

Comparises The systems of the binding force of judicial precedents, and the contrary one based on codes and in which precedents have not binding force may be contrasted by listing the advantages and disadvantages of the English system.

The advantages of the English system are:

1 - Certainty persons and their legal anvisers can have confidence in the future action of the courts.

2 - possibility of Growth. New statements of principle are made to meet new circumstances.

3 - Wealth of detail, as compared with even a long code.

4 - The practical character of case law, for it is a product of cases which have arisen in fact, and is based on experience rather than on logic.

5 - Flexibility.

The disadvantages on this line of argument, will be seen largely to cancel out the advantages They include:

1 - Rigidity, because of the binding force of an individual precedent, even if it was wrongly decided.

2 - Danger of illogical distinctions to be free of binding authority.

3 - Bulk and complexity of case law makes it difficult to learn.

4 - Juristle opimion.

the importance of scientific or professional legal opinion upon the development of the law has attracted the attention of all legal histor-

ians. So soon as a cominunity has got beyond the stage at which law is confined to mere customary rules the law becomes the possession of a professional class. It is to the efforts of this professional class that the development of the law has been principally due.

In countries in which the administration of the law has become the business of an organised profession the members of the profession are usually divided in to two classes, the Bench and the Bar. On the Bench ait the judges, at the Bar plead the advocates of the suitors to the court. In the previous section, we have outlined the importance attached to the Bench and its rulings in different legal systems. In the present section, we shall attempt to expose the importance of members of the Bar in different legal systerms from the point of view of the influence they have had upon the development of the law.

Roman law. The history of Roman law furnishes us with a good and old example of the influence of professional opinion upon the growth of law. It was the business of the Roman jurists to give opinions (responsa, from respondre, to answer) upon points submitted to them. The importance of these «responsa» cannot be appreciated unless we remember that at Rome the judges were not usually jurists. Professional learning was with the judges rather than with the jurists.

Under the Early Empire the responsa of certain selected lawyers were made authoritative; those became binding upon the judges and were therefore creative directly of law. In the last period of Roman law, the writtings of five selected jurists of the classical period were given the force of law by a Constitution of the Emperors Theodosius II and Valentinian III (Law of Citation, A. D. 426). The student who truns to the Digest of Justinian will find that it consists largely of ser-

ies of readings from famous textbooks.

When at the time of the Renaissance, the reception of Roman law was stimulated, it was to the Digest that men turned. The grest teachers of Roman law achieved international fame, and Roman law was regarded almost as the common law of Western Europe. Many countries employed lay judges and there was little on no systematic instruction given in the native customary law. Hence, when an expert class was needed, it was the doctors of Roman law who were called upon, with the result that the influence of Roman law increased, and correspondingly the textbooks gained greater prestige.

French law. In France, the influence of juristic opinion has been very great. Even in the days before the Civil Code (1804) the great lawyers in France influenced the law not by decisions given on the Bench, but by their writings. Among such may be mentioned Du Moulin, Domat, and Pothier. Pothier was the greatest of these, and his influence upon the development of French law has been of incalculable importance.

Since the publication of the Code, the systematic discussion of the law by jurists, and in particular by lawyers occupying chairs at the Universities, has continued, and this discussion has had a marked influence upon French legal development. Side by side with the «jurisprudence» (view of legal questions adopted by the courts) has grown up a body of «doctrine». «La doctrine» is defined as «the body of opinion set forth by jurists in their book». Great respect is shown in France for the opinions of these doctrinal writers. Indeed, the opinion of the French professor, however eminent, is not an authoritative source of law, for it is not legally binding upon the judge. But it is highly likely that the judge is to be much influenced by it. Doctrinal writers in France have set them selves to interpret the Codes. To that

end, they have subjected the words of each section to an exact scrutiny and have sought by such an examination to explain their precise import and the connection which exists between the different sections. Further, they seek to expound the principles upon which the codes are based, so that decisions upon points not dealt with by its provisions may be in harmony with it.

For many years after the promulgation of the French codes the «doctrine» developed and expanded independent altogether of the «jurisprudence». There was a divorce almost complete between theory and practice. In the schools, the code was regarded as a systematic and final statement of unchangeable and absolute principles of justice. This led to the rise of the «Exegetical School», which we previously discussed, In the Courts on the other hand, the codes only made their way slowly. They had to struggle with the habits of thought and traditional views of law which survived from the epoch before their compilation later, however, the codes succeeded in conquering the courts.

It was not, there fore, surprising that doctrinal writers should have worked out their theories and expound the principles of the codes in severe indifference to the decisions actually given in the courts. This duality, which really meant a separation between the «theoretical» and the «practical» life of the law, continued during the whole half of the nineteenth Century. The dangers of this duality was realised, and when the Exegetical School faded, the jurist began to interprete the provisions of the codes, regarding them, not as some thing sacred, but as living formulae much in need of being developed. A change was first manifested in th Schools by the occasional quotation of decisions to support particular theories, but the tendency to refer to cases grew until at the present moment the doctrine shows some sign

of becoming an exposition of the principles of law applied in the courts. Indeed, law cannot be separated from life. The spirit of the law is to be found in the life of the people. The establishment of a close connection between the doctrine and the jurisprudence is the surest guarantee of development of a law at once practical and systematic.

Islamic law. The jurisprudence has also influenced to a very great extent the development of Islamic law. The founders of the great schools of thought, both Sunni and Shi'i expounded the law in a way to make it more consonant with social needs in society. In fact, the respect paid to «consensus» (Ijma') and «Analogy» (Qiyas) as being two the four sources of law is itself indicative of the high position to which juristic opinions are levelled.

Iraqi law. Juristic opinion in Iraq is on «interpretative source of law». This is emphasized by Article (1) of the Civil law no. 40, 1951.

It is noticeable, how ever, that the standard of the Iraqi textbook, if any is on the whole, very low indeed. It still lacks depth of perception, technical exposition, and scientific reference. Most legal textbooks are those written by the academic staff of the College of Law, and they are nothing but mere written repetitions to what is said orally in the class - rooms. The speed with which these books appear annually is a living proof on their quality. Practitioners, whether advocates or judges, have also tried their hands at legal «book making». These, again are nothing more than merc fact - collection pages, and generally, share the same quality of the College's produce.

We cannot ignore these facts, for a textbook is not a large number of printed lines on fine paper and nicely bound. Nor can we ignore the problems which face the lawyer once he sets his heart upon writing

a textbook, yet, not before a very long time will have passed that the Iraqi juristic opinion can really claim for itself to be a true source of law.

6 - Legislation

Legislation is the formulation of law by the appropriate organ or organs of the State, in such a manner that the actual words used are themselves part of the law: the words not only contain the law. but in a sense they constitute the law. Legislation includes the making of new law, and the alteration or repeal of existing law. It is the easiest and most common way of developing law in modern systems - in particular, it can change the law, which the Courts cannot do.

According to Maine in his celebrated book «Ancient law» (1861), legislation is historically the latest of the agencies by which progressive systems of law are brought into conformity with the needs of society. After the codification of customary law, the agencies brought in to play to prevent stagnation are «fictions», or devices (mostly procedural) by which the substance to the law is changed while appearing to remain the same, and the extension of the law by judicial and juristic interpretation, then «equiy», then legislation, Any or all of these agencies may be in use at the same time, for a later does not necessarily displace an earlier. But, according to Maine, this is the invariable order in which they appear, or, at least, in which they exert their chief influence. Thus, a community which has known legislation as a method of general law making does not revert to custom as a mode of developing its law.

Importance of legislation. Legislation is the prime and most important source of law in civilized countries. Today, a great and increasing part of the law of these countries is to be found embodied by the law -

making authorities in decrees or statutes. By legislation this literary expression is an essential part of the law it self.

Lagislative activity is of modern growth. The causes for its importance may by referred to three principal reasons. These are:

1 - The increased range of the activities of the modern State and its centralizing tendency. For good or evil, the State having gained a supreme authority, tends more and more to be regarded as the normal regulator of social life and director of social activities.

2 - The rise of democratic forms of government is, also a reason for the popularity of legislation as a source of law.

3 - The emergence of socialism in many countries, particularly after the two World Wars has landed legislation on a concrete ground. In an era of social change such as ours, legislation is the natural method of law - making for effecting socialist policies. Socialism requires the interference of the State in almost all spheres of private and public life. The machinary of legislation is there fore, the easiest and most effective means for realising this end.

Advantages of legislation. The advantages of legislation may be stated briefly as follows:

1 - Clarity. By legislative enactments, the legislative organ states to the citizens the rules which are henceforth to be considered as rules of law. normally, in an easy language.

2 - Speed. A change in the law is effected by the simple process of repeal and substitution of new rules. The astonishing ease of this process can be seen if it is compared with the circuitous and tedious methods by which changes in the law were brought about in earleir times.

3 - Universality. Once legislation is put. to effect, its rules become the governing law in all parts of the legislating countries. Thus, the governing rule is one and the same irrespective of localities.

Kinds of legislation It is possible to conceive many kinds of legislation. Thus, «direct» legislation is the making of law by means of the declaration of it (the theory of the judicial process in England), and «indirect» legislation on the other hand, includes all other modes in which the law is made. Also the parties to a contract may be regarded, in a sense, as having power to legislate for themselves. But in th sense of the definition of legislation adopted at the out set of our inquiry, it is conceivable to divide legislation in to three categories:

1 - Constitutional Legislation. This is the most supreme kind. It is the constitution of the State which defines its political system, the form of its government, and the relation ship, among the State's public authorities.

2 - Ordinary legislation. The greatest part of legislative enactments belong to this category. It includes all legal rules enacted by the legislature in accordance with the principles of the constitution.

3 - Subordinate Legislation. This category describes the legal rules enacted by the «executive» acting upon a delegated authorilty from the legislature, as is the case with enacting «regulations», or when is acts on the legislature's behalf, as is the case with enacting «executive order».

Codification. codification is the reduction of all rules of law, so far as practicable, to the form of enacted law. It is sometimes said that the predominant motive for codification was a desire to render the law certain, but this was really over shadowed by the desire to replace the dif-

fering laws of the various provinces or states by a system that was national and unified. Two types of countries tend to adopt codes: those with weil - developed systems where the possibility of further development is remote for the moment: those with undeveloped systems which cannot grapple with new economic problerns.

In this respect, England lags far behind the Continent. Since the middle of the eigtheenth century, the process has been going on in European countries, countries of the Middle East including the Arab countries, and those of the Far East, the Americas and Africa, and is now all but complete. Nearly everywhere the old confused mixiture of civil, canon customary, and enacted law has given place to codes constructed with more or less skill and success. Even in England, and the other countries to which English law has spread, tentative steps are being taken on the same road. Certain isolated and well - developed portions of the common law, such as the law of bills of exchange, of partnership, and of sale have been selected for transformation in to statutory form. However, In countries in which the force of judicial precedents is supreme, codification must not be understood to involve the total abolition of precedent as a source of law. Codification means, not the total disappearance of case law, but merely the reversal of the relation between it and statute law. It means that the substance and body of the law shall be enacted law, and that case law shall be incidental and supplementary only. No legislative skill can effectualy anticipate the complexity and variety of the facts. The function of precedent will be to supplement, to interpret, to reconcile, and to develop the principles which the code contains.

An interesting compromise between case law and codification is the American law Institute's Restatement or American law. The Restatement is in the form of a code, but it is not statutory and has no offi-

cial sanction. Its authority in the Courts of the United States, which is considerable, rests entirely on the eminence of the jurists who have framed it. Generally speaking, the Restatement, as its name implies, merely declares the existing law, without attempting to suggest or incorporate improvements in it. But where the decisions are in conflict, the framers of the Restatement have adopted what they consider to the preferable rule, not necessarily the one supported by the greatest mass of authority.

The advantages of codification may be stated briefly as follows:

1 - It makes the law simple and accessible, logically arranged and harmonious, certain and dehnite.

2 - It unifies the country through the unification of legal rules. which culminates in the imposition of a national legal system. This was particularly the case in France, where the Codes unified the North with its customary law (pays de coutume; pays de droit non écrit) and the south with its written law (pays de droit écrit).

3 - Codification is an excellent means for receiving the benefits of legal solutions supplied by foreign legal systems.

Nevertheless, codification has its own disadvantages. Firstly it has sometimes been claimed that codification leads to the inevitable result of rigidity so long as jurists will tend to think that the few sections of a code include all the law that there is. This is more apparent than, real, how ever for all the law depends on the method of its drafting and the manner of interpretation, Secondly, it has been voiced that a code does not normally contain definitions of legal concepts, such as fraud, good faith, and the like. But no code, however complete, can be expected to do more than lay down the main principles upon which law is to be administered and to provide clear rules for those cases

which are of common occurrence. It is the art of the lawyer which consists in the reasoned application of the rules which the code provides to the complicated diversity of the affairs of men.

IV
INTERPRETATION OF LAW

1 - Definition

Interpretation, generally, means the elucidation of obscurity in the law, filling the gaps in its structure, and the reconciliation of its contlicting provisions. In other words, interpretation is the determination of the content of a legal rule, and the detintion of its elements and characteristics.

2 - The Need for Interpretation

All matters which come before a court, whether they be human conduct, natural events, judicial decisions or legislative enactments must in a sence be interpreted, so that their legal signilicance must be assessed. Experience shows that no drattsman can altogether avoid such flaws as ambiguity, obscurity or conflict of sections, and even if he could, new problems arise which could not possibly have been forseen and new social philosopher become popular which are out of keeping with the basis on which the code is built.

The causes pf ambiguity in enacted law, which in its turn makes interpretations an inevitable process, may be referred to:

1 - Technical causes arising from the great difficulty to encompass all the facts of life in order to specify a governing rule for each, Thus, the legislature contends itself with enacting general rules, leaving minor details aside rof interpretation to determine whether they are like wise governed by the general rule, or any other.

2 - Political or social reasons may oblige the legislature to form ulate the second rules in an ambiguous way, leaving the abstraction of the meaning aimed at to the courts. A good example is when the legislative authority leaves to the judge the discretion to determine whether a certain crime is political, or ordinary.

3 - Pragmatic reasons necessitates interpretation, as when ambiguity is due to negligence, mistake, of lack of foresight.

4 - Some legal concepts are founded upon abstract notions the content of which is strongly connected with the current views adopted in society at a certain time. Social views develop as life in society rolls by, and thus, these legal concepts cannot be stated in general and abstract form as to be determined in consonance with the current social view. An example in point is that of «public policy». Contracts contrary to public policy are void, but public policy is a relative concept to be defined at the moment of decision in a case. This definition is the function of interpretation.

5 - No matter how careful a draftsman may be, the long application of an enacted rule tends to make it rigid. Interpretation tries, there fore, to colour it with a much needed flexibility, if the rule were to survive.

It is not unnatural, there fore, for jurists to attempt laying down certain scientific principles for legislative technique. Montesquieu has made such an attempt, and Professor Allen has summarised Motesquieu's rules as follows:

1 - The style of a legislative enactment should be both concise and simple.

2 - The terms chosen should, as far as possible, be absolute and

not relative so as to leave the minimum of opportunity for individual difference of opinion.

3 - Laws should confine them selves to the real and the actual, avoiding the metaphysical or hypothatical.

4 - They should not be subtle. «for they are made for people of mediocre understanding; they are not an execcise in logic, but in the simple reasoning of the arverage man».

5 - The shoud not confuse the main issue by any exception, limitations or modification such as are absolutely necessary.

6 - They should not be argumentative; it is dangerous to give detailed reasons for laws, for this merely opens the door to controversy.

7 - Above all, they should be maturely considered and of practical utility, and they should not shock elementary reason and justice and the nautre of things, for weak unnecessary, and unjust laws bring the whole system of legislation in to disrepute and undermine the authority of the State.

3 - Kinds of Interpretation

There are three fundamental kinds of interpretation.

1 - **Logislative.** legislative interpretation emanates from the legislative authority. It takes place when a legislative enactment is wrongly understood by the Court and, so, the legislature feels obliged to enact a new law to clarify the meaning aimed at in the previous legislation.

2 - **Judicial.** From the point of view of practice, judicial interpretation is the more common. It is exercised by the courts, in which judges are required to exert every effort to deduce the meaning of the terms used, by the legislature. In most cases, the judge in order to arrive at the actual meaning, use all the means of interpretation, be it

linguistic, logical, or rational. He often refers to the material and historical sources, and the preparatory materials (tarvaux préparatoires) of the law to be interpreted.

3 - **Juristic,** Undoubtedly, juristic interpretation is the widest mode, because of the unrestrieted freedom of the jurist to build his understanding of the law the way he deams. The jurist is not tied down certain actual cases, nor is his effort fattered by strict standards to be adopted.

V
CLASSIFICATION Of LAW

The most accepted classifications is the one employed by the Roman. The Roman classification divides law in to «Public law» which was defined as the law relating to the welfare of the Roman State, and «Private law» which was said to be concerned with the welfare of individual citizens. This classification is the most usual in France. This is not surprising, how ever, if it is remembered that the French way of thinking favours logical classifications to a great extent. In England on the other hand, the use of the terms Public and Private law is no more than a translation of a foreign expression nothing slse. In fact, the English «common law» includes rules of criminal (public) law, civil (private) law, and constitutional (public) law.

But, it should be emphasised that the most that this classification can do is that it facilitates the task of the law student. It enables him to encompass similar or approximate rules which deal with topics similar in nature within one range, and thus, it becomes easy to be acquainted with them.

1 - Public law and Private law

The Roman definitions stated in the previous section roughly indicate the scope of the two main categories of law, but a more detailed examination of the use of the terms is desirable.

«Public law» regulates the constitution of the supreme and subordinate authorities of the State, whether legislative, executive, or judi-

cial, and the methods of operation of each. It includes also the rules governing the relations of the State authorities in an administrative capacity with private individuals. When ever the State acts as the representative of the community as a whole, the rules determining its action form part of public law.

«Private law» on the other hand, is concerned primarily with the relations of private individuals among them selves, or between them and the State, when the latter acts in a contractual manner like any entity possessing legal personality. In private law the State is indeed present, but it is present only as arbiter of the rights and duties which exist between one of its subjects and another. In public law the State is not only arbiter, but is also one of the parties interested.

Public law includes «Public International law», Constitutional law «Aministrative law», and «Criminal law and Criminal Procedure». Private law contains «Civil law», «commercial law», Civil and Commercial Procedure, and «Private International law». These branches will be briefly defined in the following pages.

2 - Branches of public law

1 - Public international law Public international law is the body of rules which apply between sovereign States and such other entities as have been granted international personality.

the most authoritative statement indicating the sources of public international law is the one contained in Article (38) (1) of the Statute of the International Court of Justice. which reads as follows:

1 - The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a - International conventions, whether general of particular, es-

tablishing rules expressly recognised by the contesting states.

b - International custom, as evidence of a general practice accepted as law.

c - The general principles of law recognised by civilized nations.

d - judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Sources of public international law are, there fore «original» which include treaties, international custom, and general principles of law recognised by civilized nations, and «subsidiary» which refer to judicail decisions and doctrinal opinion.

Public international law deals with a wide range of matters. Any standard textbook on the subject will be found to deal with International personality personified by the typical subject of inter national law - the State (composite states, dependant states, protectorates, League mandates, trust territories, free cities), the sovereignty and equality of States; recognition, the individuals, corporations and ships and international law; international representation; State succession; State jurisdiction; immunities from, and limitation of territorial jurisdiction under international customary law (diplomatic and consular immunities and privileges, limitations over the territorial sea and national waters, limitations in favour of foreigners and the minimum standard of international law); limitations of territorial jurisdiction under conventional law (freedoms of fisheries and navigation which are problems of the international law of the sea, freedom of trade and work which are matters for international economic law and international labour law respectively, extradition, diplomatic asylum, and genocide, which are for international criminal law to regulate, and what relates

to the rights of minorities: objects of international law (the territory of the State,Its land Frontiers its maritime frontiers - national waters, territorial waters, the contiguous zone, the high seas, bays islands): international transactions (treaties - conclusion, legal effect, conflict, interpretation revision, and termination of treaties -, international responsibility for torts and for breach of obligations, and reparation). All these matters collectively are topics of international law in time of peace. When a State of war is declared, certain rules become applicable, and so in the other two main parts of international law, that is war and neutrality, one can find the following questions regulated: characteristics of war, causes kinds, and ends of war; the region of war; belligerents; enemy character, commencement of war; effects of outbreak of war, rules concerning warfare on land (treatment of wounded and dead bodies, captivity, appropriation and utilisation of public and private property, requisitions, contributions, destruction of enemy property, assault and bombardment, espionage and war treason, occupation of territory, etc.); warfare on sea (attack and seizure of enemy vessels, appropriation and destruction of enemy merchantmen, treatment of wounded and shipwrecked, interference with submarine cable, etc.); warfare end of war; neutrality characteristics, kinds, commoncement and end of neutrality, blockade; contraband; unneutral service; right of visit and search; relations between neutrals and belligerents; etc. International law regulates also the amicable ways for the settlement of international disputes, such as negotiations, conciliation, arbitration and judicial sttlement in the International Court of Justice. An important part of international law is that of international institutions, such as the United Nations and varous specialized agencies.

2 - **constitutional law.** constitutional law defines the form of the

State and determines the organs of its government. The State is a body of persons organised for political purposes, it is necessary to ascertain what persons are members of this body, over what territory it extends, and in whom the power which the State exercises is vested. All of these matters enter in to the Constitution of the State and are treated under the head of constitutional law.

The truth is that the constitution and authority of the supreme power must rest ultimately upon the active will or, at least the acquiescence of the majority of the people. They constitute the point of attack in any popular uprising and form, there fore, so to speak, the bulwarks of the law. The Constitution being outside the law is regarded as more scared than the law. And one consequence of this is the inclusion among constitution principles of certain fundamented rules of law to the maintenance of which special importance is attached. such for example, are the rules which guararntee to citizens liberties regarded as essential for orderly life in society.

3 - **Administrative law.** Administrative law is the body of rules which determines the administrative organization of the State, the legal relation ships which arise between the State and individuals as a result of its functioning, and the legal principles applicable in the ensuing disputes between them. Administrative law, there fore, deals with the rules organising the executive authority, and thus, it is strongly linked with constitutional law. The boundary line between the two laws is bard to define, The basis of distinction is that administrative law deals only with the working of the executive authority, and more precisely the executive activities of this authority in complete exclusion to what is known as «sovereign acts», such as the declaration of war, the dissolution of parliament, and the like. In a more strict

sense, constitutional law should include only the framwork of the supreme authority, the methods of its working being regarded as part of administrative law.

Matters assigned to administrative law include, inter alia, the formation and orgnization of executive authority, that is to say the administrative organization of the State itself, begining with the head of State descending to the cabinet, the different ministries and their varlous departments and institutions; regional and municipal institutions; institutions of public utility responsible for education, health, defence, security, communications, and the like services which the State renders to the individuals in society; the organization of the affairs of public servants and officers working in the civil service, the determination of the relation ship between the central authority and the provinces, and

[redacted]

The Baghdad Panel Code, 1918, is the applicable law i

one. The Baghdad Penal

g a special provision to each individual

Code had distinguished two types of offence

«Offences of a Public Nature», such as offen

safety of the State, offences against the inte

(such as insurrection, unlawful assemblies, d

offences by or relating to public servants (e.

the form of acc

[redacted]

assumption of rank or office), false ev

tion, and with holding information, counterfeiti

public matters (e. g. false coin, public document

passports, & certificates), offences ralating to t

and means of communication, offences relating t

and convenience, morals and decency, cruelty t

lating to religion. The second type of offences i

. The first type includes
nces against the external
ernal safety of the State
langerous publications),
g. corruption mainly in
idence, false informa-
ing and falsification in
s, notes, stamps, seals,
elegraphs, telephones,
to Public health, safety
to animals offences re-
s of «Offences against

Persons and Property». These offences are: offences affecting human life and the body (e. g. homicide, bodily injury, and abortion), offences against morality and the marriage tie (e. g. rape, sedomy and indecent acts, adultery, and bigamy), illegal arrest and confinement, abduction, intimidation and threats, defamation, disclosure of secrets, misappropriation of property (e. g. theft robbery, extortion, criminal conversion and breach of trust, obtaining property by false pretences and cheating, receiving property unlawfully obtained), forgery, offences relating to trade (e. g. false weights and measures, interference with freedom of auctions, infringement of exclusive rights, trading in prohibited articles), offences against creditors (false weights and measures, bankruptcy), injury to property (arson, and wilful destructionn and damage), criminal trespass.

with criminal law, «Law of Criminal Procedure» is strongly connected. This law specifies the formal rules which direct the detection, investigation, and punishment of crimes. It begins with the ways of detection, and ends in pronouncing a judgmet either of committal or of innocence. Between these two stages, there are many steps to be followed. Thus, the law of criminal procedure deals with collection of evidence, investigation, committing the case to trial, and indictment which is presented by the public prosecutor. Moreover, this law also deals with the authority of the public prosecutor, the various grades of criminal Courts and ways of appeal.

3 - Branches of private law

1 - Civil law. In its wider sense, civil law is «the body of rules which regulate the private relationship of individuals in society, whether these relationships appertain to the family or to ordinary transactions».

Civil law is the original source of Private law. Thus, Commercial law, the law of Civil Procedure, Private International Law, Labour law, Agricultural law, are in fact, nothing more than aspects of civil law regarded as special branches merely to emphasize their importance. either because they relate to a special class of persons or affairs, or because they can be distinguished by certain characteristics which necessitated a separate treatment. This is why it is always possible to fall back on the provisions of civil law in all matters not covered by a special rule in the other branches of civil law. This is also the reason for setting special chapters in modern civil codes to deal with the general rules applicable to all branches of private law.

Ordinarily, civil codes regulate two kinds of relationships. These are:

1 - Family relationships, which are in Iraq regulated by the Law of personal Status No. 188, 1959, as amended by the law No. 11, 1963.

The best way of exposing the subjects of civil law is to illustrate the topices regulated by the Iraqi Civil Code. The Code is divided in to an Introductory part, and two Main parts. The Introductory part includes General provisions concerning the application of law, conflict of laws in time and place, persons, things property, and rights. The First part deals with personal Rights (obligetions) as follow:

(1) Book I, concentrates on «Obligations Generally». This is subdivided in to six. Chapters, as follows:

1 - Sources of Obligations, which encompasse:

(a) contracts.

(b) Unilateral Under takings.

(c) Unlawful Acts.

(d) Enrichment without just cause.

(e) The law.

2 - the Effects of obligations, which deals with:

(a) Obligatory performance.

(b) Means of securing the Rights of Creditors.

3 - Conditions Modifying the Effects of Obligations, which are:

(a) Conditional obligations and Time Clauses.

(b) Plurality of Objects of an obligation.

(c) plurality of parties to an obligation.

4 - Transmision of an obligation the two means of which are:

(a) The Assignment of a Right.

(b) The Assignment of a Debt.

5 - The Extinction of obligation by means of:

(a) payment.

(b) Mothods of extinction Equivalant to payumont.

(c) Extinction of obligations whithout paymant.

6 - Proof of obligations, which deels with:

(a) General maxims of Evidense.

(b) Documents.

(c) Admission.

(d) Oath.

(e) Evidence by witnesses.

(f) presumptions.

(2) Book II, deals with Specific Contracts, and it is sub - divided in to five chapters as follow:

1- contracts as regards ownership, such as:

(a) Sale.

(b) Gift.

(c) Partnership.

(d) Loans and Annuities.

(e) Compromise.

2 - Contracts redating to the use of a thing which include:

(a) Leases.

(b) Loan for use.

3 - Contracts for the Hire of services, which are:

(a) contracts for work and concessions for public utility services.

(b) contracts of service.

(c) Mandate.

(d) Deposite.

4 - Aleatory contracts, such as:

(a) Gaming and Betting.

(b) Life annuties.

(c) contracts of Insurasce.

5 - Suretyship

The Second man part of the Code, entitled Real Rights, includes Books III, and IV, which are set up for dealing with these rights as follows:

(3) Book III, provides for The Principal Real Rights; it is subdivided in to two chapters, as follow:

1 - the Right of Ownership, in general:

(a) The Right of Ownership.

(b) Acquisition of Ownership.

2 - Rights derived from the Right of Ownership. which include:

(a) The Right of Hekr.

(b) The right of Usufruct of the user, of occupation, and of Musatahah.

(c) servitudes.

(4) BOOK IV, governs Accessory Real Rights or Real securities.

This Books is divided into three Chapters, as follow:

1 - Mortgages

2 - Pledges.

3 - Privileged.

But it is interesting to point out that be Iraqi Civil Code contains, side b side with civil law prcvision rules relating to personal status, such as those concerning the characteristics of personality, nationality, the family, the name, the title, comicile, the age of majority, and the like.

2 - **Commercial law,** Rules of commercial law regulate legal relationships between merchants and all commercial business activities, It is, thus, like civil law in dealing with financial relationships. But the difference between them is that the financial relationships which are governed by commercial law are determined either in accordance with characteristics of a certain class of individuals, or on the basis of the nature of transactions. thus, it may be the case that the provisions of commercial law apply to transactions commercial by nature. although the individuals concerned in it are not merchants.

The seperation of commercial law from the rest of the civil law is convenient, and does not rest on any scientific basis, it is convenient to group together the rules which have particular reference to matters of trade, but there is no other reason for making the distinction. The nature of commercial activity requires speed in transacting it, and special principles to be developed in consenance therewith. Great hardships will ensue if we insist on the application of the more strict and highly formal rules of civil law in this respect.

Commercial law includes the rules applicable to the deter mination of the characteristics of commercial activity. It specifies the criteria which establishes the status of a merchant, such as capacity, professional character, legal personality in the case of corporate entities. Commercial law also deals with the duties imposed upon merchants, such as the duty to keep certain commercial registers. and to assume a commercial address. Moreover, it is in commercial law that students come across the study of the various kinds of commercial association like corporations, companies with limited liablity, partnerships, and the like, in addition to the rules governing bankruptey and commercial paper like cheques, bills of exchange, bonds, notes, shares.

Finally side by side with commercial law, there is the special

branch of «maritime law». This branch deals with the carriage of goods by sea, marine insurance, and all that relate to the sale of sea vessels, their gear, and provisions.

3 - **The law of civil and commercial procedure.** This branch of the law may be defined as «the body of rules that regulates the means to be followed in the application of the rules of the civil law». The law of civil and commercial procedure is not a law of substantive rules, but an adjective law merely indicating formal steps to be followed.

In any civilized system of law, it is, undoubtedly, established that individuals possees no inherent power to get their rights for them selves, but should follow a formal approach in getting them. The individual who alleges that a certain right belongs to him should claim it by the institution of a case in a Court having a jurisdiction to decide it. As a plaintiff, be should undertake the service of process, that is, acquaint the defendant with the case instituted against him. In court, the judge directs the case along the procedural lines indicated by the law. Thus the parties present their claims, counter claims, and defenses. Finally the Court promounces its judgment in the light of the evidence presented before it. Appeal from this judgment may be taken to a higher court, and so formal appeliate steps must be followed in the establishment of the disputed right. All these matters are the subject of, and regulated by, the law of civil and commercial procodure. The applicable law in Iraq is that of the law of civil and commercial Procedure No. 88, 1955.

4 - Private international law is that part of the law. which comes into play when the issue before the Court affects some fact, event or transaction that is not cleacly connected with a foreign system of law as to necessitate recourse to that system, It has accordingly been described as meaning «The rules voluntarily chosen by a given State for

the decision of cases which have a foreign complexion». The legal systems of the world consist of a variety of territorial systems, each dealing with the same phenomena of life - birth, marriage, death, divorce, bank ruptcy, contracts, wills, and so on but in most cases dealing with them differently. The moment that a case is seen to be affected by a foreign element, the Court must look beyond its own internal law, lest the relevant rule of the internal system to which the case belongs should happen to be in conflict with that of the forum. The forms in which this foreign element may appear are numerous. One of the parties may be foreign by nationality or domielle a trader may be adjudicated bankrupt in Iraq having numerous creditors abroad; the action may concern property situated abroad or a disposition made abroad of property situated in Iraq; If the action is on a bill of exchange, the foreign element may conist in the fact that the drawing or acceptance or indorsement was made abroad; a contract may have been made in one country to be performed in another; two persons may resort to the Courts of a foreign country where the means of contracting or dissolving a marriage are more convenient than in the country of their nationality or domicile.

Prtvate international law comes, there fore, into operation when ever the Court is scised of a suit that contams a foreign element. This branch of the law owes its existence to the fact that there are inthe world a number of separate municipal systems of law a number of separate legal units - that differ greatly from each other is the rules by which they regulate the various legal relations arising in daily life. The occusions are frequent when the Courts it the country must take account of some rule of law that obtains in another. A sovereign is supreme within his own territory and according to the universal maxim of jurisprudence he has exclusive jurisdiction over every body and

everything within that territory and over every transaction that is there effected. he can if he chooses, refuse to consider any law but his own. the adoption however of this policy of in difference, though common enough in other ages, is impracticable in the modern civilized world and nation have long found that they cannot by sheltering behind the principle of territorial sovereignty, afford to disregard foreign rule of law merely because they happen to be at variance with their own territorial or internal system of law.

It clearly appears from what has been said that in cases involving foreign elements, the national Court needs to answer two questions these are:

1 - Has the national Court jurisdiction to decide the case, or is it possessed by a foreign court? This process is called «choice of jurisdiction», and it is the first problem that demands solution from the court. The rules which assist the Court in deciding the question of jurisdiction are designated «choice of jurisdiction rules».

2 - Having decided that jurisdiction exists, the national court, then, asks: Does the internal law of the forum (lex fori), or the internal rules of some foreign law (lex causae), gonern the case? This process is termed «choice of law». It enables the national Court with the aid of certain national rules of law, as «choice of law rules». to make the choice between the varions rules of the different legal systems connected with the case by foreign elements, which will ultimately, in being choson and applied dispose of the case before the court. It is to be noted that inherent in the process of choice of law are problems of «classification» and «reavei». Classification is a celebrated doctrine of privat international law. It means, in very wide terms the determination of the nature of the case, which in neccessary for the selection of the appropriate despositive choice of law rule. Renvoi another well -

established doctrine, means the application of the choice of law rule of the foreign legal system to which the national Court is referred by its own choice of law rule, and the determination of the case of accordance with the system of law to which the foreign choice of law rule refers.

Topics in which choice of law arises extend over all legal questions. It may arise in conection with personal law maters such as marriage, divorce, nullity, legitimety, legitimation, edoption, testate and intestate succession, and matrimonial property, in all of which the question whether the criteria of personal law is nationality or domicile assumes a great importance disposition of movable property; obligations - contracts, torts and qussi - contracts -; corporations, bankruptcy.

Finally, the doctrine of public policy underlies the whole field of this study, and hence, no juriadiction is upheld nor any foreign law or judgement is recognised and followed, if such will contravene a rule of public policy of the forum.

We have said in the Inroduction to this guide - book that the study of «jurisprudence» encompasses generally a study to law and legal relations In the first part of our out line, we have concentrated on the theory of law and dealt with various questions necessary for the understanding of that theory. No such study is complete, how ever, unless it is complemented with a study to the «Theory of legal rights», which is, in actual fact, s study of the nature of legal relations. It is the function of the second part of this guide book to dispose of this question.

PART TWO
THE THEORY OF LEGAL RIGHTS

VI
DEFINITION, ANALYSIS, AND CLASSIFICATION OF LEGAL RIGHTS

1 - Definition of legal Rights

A very little consideration is sufficient to show that law has been always regarded by men as much more than the expression of the sovereign's will. The language of the law is evidence of this, for the words used by lawyers to denote legal relations and describe the aims of the law have also a wider signification in which they express, in particular, moral relations and moral aim. Thus, the words law, right, duty, obligation, sanction, justice, are all in general use outside the sphere of lawyers, although as legal terms they have also a more limited signification.

The best example of this specialized use of genral terms by lawyers is furnished by the word «right». In its primary signification this word denotes that which is straight, and which consequently does not depart from the direct road. Hence, it is used to mean that which varies from rule (wrong). Thus employed, right and wrong have often a moral signification, that is to say, the approval of an action as a right action or its condemnation as wrong implied that it is or is not in accordance with the rule or principle of morality by which conduct under the given circumstances should have been regulated.

There exists, however in every community a body of rules generally admitted by its members as providing proper «standards of con-

duct», and by these rightness and wrongness of an action are popularly judged. If the bulk of the community admits that the rule is a rule of right, it becomes the right of all to act or to expect action in conformity there with, Emphasizing this aspect of the right, it may be defined as «one man's capacity of influencing the acts of others by means not of his own strength but of the opinion or force of the society». Or, to put it differently, «a right is an interest recognised and protected by a rule of right. It is any interest, respect for which is a duty, and disregard of which is a wrong».

Lawyers, however, are not concerned with the study of all claims admitted as rights by the community. They are only interested in «legal rights» only, that is those which are in conformity with rules of positive law. A «legal right» is an interest recognised and protected by a rule of legal justice; an interest the violation of which would be a legal wrong done to him whose interest it is and respect for which is a legal duty. «Rights» says Thering «are legally protected interesis».

2 - Analysis of Rights

Legal rights are of a very varied charactar. An elector has a right to vote; a creditor has a right to be paid; an owner of land has a right to the unmolested enjoyment of the land; etc. When ever the law protects a man in the enjoyment of some claim or interest it confers upon him a legal right, The with drawal of the protection of the law destroys the legal right, though there may, of course, still subsist a right justified by the precepts of the moral law.

In order to maintain one man's legal right, the law imposes on other a corresponding legal duty. Thus, if one person has a right that some thing should be done, this implies that there is a duty imposed upon another or others to do this thing. A breach of such a duty is a

wrong. To the breach of duty the law attaches a sanction and, by so doing. protects the holder of the right in its enjoyment.

Generally speaking, it is not difficult to say upon whom the duty corresponding to a right is imposed. It is imposed upon all persons against whom the right is available. Some times the right is availabte only against one person. Some times how ever, the nature of the right makes it necessry to impose the duty to observe it upon all members of the community. Thus to the right of the owner to the enjoyment of the thing owned corresponds a duty imposed on all persons not to interfere with such enjoyment. Any person who does so interfere commits a legal wrong.

Characteristics of legal rights. Every legal right has the five following characteristics:

1 - It is vested in a person who may be distinguished as the owner of the right, the person entitled, or the person of inherence.

2 - It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of the duty, or as the person of incidence.

3 - It obliges the person bound to an act or omission in, favour of the person entitled This may be termed the content of the right.

4 - The act or omission relates to some thing (in the widest sense of the word), which may be termed the object or subject mutter of the right.

5 - Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner.

Every right, there fore, involves a three fold relation in which to

owner of it stands:

(i) It is a right against some person or persons.

(ii) It is a right to some set or omission of such person or persons.

(iii) It is a right over to some thing to which that act or omission relates.

3 - Kinds of Legal Rights

various clessifications in genral are in use. These are based upon differences in the character of the persons of inherence or the persons of incidence, differences in the nature of the demands made by their holders, differences in the origin of the rights.

The following classifications, which are the best known, will be explained here briefly:

1 - Public and private Rights.

2 - Rights in rem and Rights in personam.

3 - Real and Personal Rights.

4 - Proprietary and Personal Rights.

5 - Antecedent and Remedial Rights.

6 - Positive and Negative Rights.

7 - perfect and Imperfect Rights.

1 - **Public and Private rights,** In the real sense, the term «Public» is most frequently used to describe rights held by the State as contrasted with the private rights held by the individuals. State rights are public because the State holds them as representing the community or public. This distinction is derived from that existing between public and pri-

vate law already explained.

The term «public right» may also be used in other senses as well. It is some times used to denote those rights which are enjoyed by all persons as such, merely as a consequence of the facts of natural personality and membership of society, such as rights to personal security, to personal freedom, to reputation, and the like Again, in a different sense, the word «public» is sometimes given to those rights which concern the government and administration of the country.

But, in all these some what differing significations, the word «public» denotes that which belongs to or concerns the people as a whole in contrast to that which concerns individuals only.

2 - **Rights in rem and rights in personam.** The distinction between a right in rem and a right in personam is based upon a difference in the character of the person against whom the right is available (person of incidence). A right in rem is one which is available against an indeterminate number of persons, i. e., against all persons indefinitely. Such for example, are rights of ownership, rights to personal security, and the like. A right in personam is available only against a determinate person or persons. The right of a servant ot his wages, or of a tenant to possession of the house he has leased, is available only against the master or the lessor, and such rights are therefore in personam.

3 - **Real and personal rights**. Some rights are enjoyed with respect to a deteminate thing. When rights thus enjoyed are available against the world at large (i. e.in rem) the relation between the holder of the right and the persons subject to the correlative duties occupies a much less prominent place in though than his visible association with the thing itself. Of course, no relation which falls within the class of rights can really exist between a person and a thing. Yet it is quite reason-

able that the right should be more clolsely associated with the thing of which it secures the enjoyment than with the indefinite group against whom it is available. such rights are consequently termed «real».

When, on the other hand. the right is one available against determinate persons it is the association of the person of inherence with the person of incidence which is most prominent in thought if (A) lends (B) on hundred dinars, his right to recover the money is available against (B) alone, and it is this personal relation of the two men which strikes us at once as its dominent characteristics. Such rights are there fore described as «personal» when contrasted with «real» which relate directly to a thing.

4 - Porprictary and personal rights properietary rights are those which have a money value or, in other words, form part of a man's economic wealth. The class includes such diverse rights as the right of ownership of land, the copyright of a book, rights to repayment of money or to pecuniary damages for injury done, rights to alimony, and rights of succession to property. All these rights have a money value. Proprietary rights are of two. Kinds They fall under the head either of «Property» or «Obligation».

The class of personal as opposed to properietary rights includes all rights which are not valuable in the economic sence. Of these the two principal classes are the rights which arise from family relations, and relations, and those vested in persons in right of their citizenship.

The student must note that the distinction now under discussion has nothing in common with that already discussed between rights in rem and rights in personam. some proprictary right are in rem e.g the right of ownership. Others are in personam, e. g. the right to recover money lent. Most personal rights indeed, are in rem, e. g. the right to

personal freedom, but an example of a personal right in personam may be found in that of the husband to his wife's society. It follows, also that the term «personal» when opposed to «proprietary» has a different signiflcation to that which it has when aposed to «real». The right which is «personal» not «real» may yet be properietary.

5 - **Antecedent and remedial rights.** Some rights are enjoyed for their own sake, others are conferred in order to remeciry a breach of pre - existing right. If my right in rem to freedom of person is violated I have a new right given me, a right, a right in personam, against the person who has injured me. This new right is «remedial» in its character and so compared with it we may say that the right originally violated violated was «antecedent» or «primary». Remedial rights are given either for breach of a right in rem, as in the example above, or for breach of a right in personam, as when a right to use is given to sanction a breach of contract.

6 - Postive and negative rights A positive right is one which consists in a claim that the person of incidence shall do some act, e. g. pay money or render services. A negtive right is one by which a torebearacnce only is claimed. Thus, the right or ownership is negative because the persons of incidence, against whom the right is available, are not bound to do some act, but merely to refrain from interfering with the owner's enjoyment of his own property.

7 - Perfect and imperfect rights The perfect right is one which is not only recognized but is also enforced by the State. Imperfect rights are recognized but not enforced by the State. Legal rights are normally perfect. Imperfect rights are exceptional. An example of such a right is furnished by a right to recover money the action upon which has been barred by lapse of time.

Moral rights which are not recognized by the law at all must not be spoken of as imperfect rights. They are not legal rights at all. Thus, the right to receive gratitude for favours granted, not bieng recognized by the law, is neither perfect nor imperfect. It is not a right at all in the legal sense.

VII
ELEMENTS OF A RIGHT

In our discussion to the «Analysis of Rights» we have concluded that every right involves a threefold relation in which the owner of it stands. It is a right, to some act or omission, over or to some thing, of a certain person or persons. In this chapter, we shall concentrate our attention on two elements of a right only. These are: the «person» and the «thing». In the next chapter to follow, we shall consider the third element in the threefold relation just notad.

1 - The person

A «person» is often defined as being the «subject or bearer of a right»; but this is to narrow the signification of the term. Rights not only reside in, but also are available against, persons. In other words, there are persons of incidence as well as of inherence. Persons are the subjects of duties as wall as of rights. In persons rights inherence, and against them rights are available. For the benefits of persons duties are created, and it is on persons that duties are imposed.

Persons, i. e. subjects of rights or of duties, are in general individual human beings. but in imitation of the personality of human beings, the law recognizes certain groups, of men or of property, which it is conventent to trent as subjects of rights and duties, as persons in an artifical sence.

1 - **Natural persons** A «natural» as apposed to an «artificial» person is such human being as is regarded by the law as capable of rights

or duties: in the language of Roman law as having a «status». As having any such capacity recognized by the law, he is to be a person or to wear the mask of lagel capecity.

Resides possessing this general legal capacity, or status, a man may also possess varions special capacities, such as liberty citizenship, and family rights. A shave, in a legal system recognising slavary, having, as such neither rights nor liabilities, and so have no status.

Anatural person must combine the following characteristics:

1 - He must be a living human being. He must be born alive though not necessarily capable of continued existence. But for certain purposes existence begins before birth. The clearest example on this is the right of the "embryo" to testate succession.

2 - He must be recognized by the State as a person, Hence, he must not be a slave in the absolute control of his master, or otherwise civilly dead, as was in English law a man who was banished, abjured the realm, or who "entered into religion" as a professional monk.

2 - **Artificial persons.**

"Artificial" "conventional" or "juristic" persons, are such masses of property or groups of human beings are in the eye of the law capable of rights and liabilities, in other words to which the law gives a status.

Such entities are treated as being persons, or a sustaining the mask of personality.

These juristic persons come into being when:

1 - There exists a mass of property, or group of persons, as the case may be,and,

2 - The law attributes to the mass or group in question the character of a person. this may occur by means of either:

(a) A special act of sovereign power, e.g. an incorporating statute, or character.

(b) A general rule, applicable whenever its conditions are satisfied, e.g, the Law Commercial Companies No. 31,1957".

2 - The Thing

A «Thing» is the object of a right. It is whatever the law regards as the object over which one person exercises a right, and with reference to which another person lies under a duty.

Of «things» in this sense, there are two kinds:

(1) Material objects, i. e. physical things, such as a house, a tree a field, a horse, or a alave.

(2) Intellectual objects, artificial things, such as a patent, a trade-mark, a copyright and easement, a bankrupt's estate. These are groups of advantages which for shortness are treated by the law as if they were material objects.

So that, just as we have seen that what the law means by a «person» is the subject of rights or duties, irrespectively of the subject being, as is more frequently the case, or not being, a human individual; so a «thing» is what the law regards as the object of rights and duties, irrespectively of the object, being as it usually is, material object.

It is no doubt convenient for the purposes of our science to include among «things» not only physical objects, but also certain groups of rights, which for purposes of transfer and otherwis are occasionally treated as if they were physical objects, The fiction by which

patents, bandrupt's estates, or easementsare regarded as «things» is indeed not only harmless but almost indispensible.

Things are further classified, in accordance with the diferent ways in which they are subservient to persons under various heads, of which the following are the more important:

1 - Things divisible and indivisible.

2 - Movable and immovable things.

3 - Things which are, and which are not, capable of private ownership.

4 - Things principal and things accessory.

VIII
SOURCES OF A RIGHT

If the right is put in motion, phenomens of new kind intervene. They are shifting, dynamical, and may be expressed by the general term «facts» under which are included, not only the «acts» of persons, but also the «events» which accur independently of volition.

It is by «acts» that rights are enjoyed, and it is through the agency of «acts» or of «events» that rights are created, transferred, transmuted and extinguished.

Facts, including events and acts, are there fore, the sources of rights, The two terms, events and acts, should consequently be analysed.

1 - Events

Events, or «facts in law» are «every material act, natural or volitional, which produces legal consequences, such as the creation, transfer, modification, or extinction of a right». The legal consequences are produce irrespective of the existence of the will.

Events may be either movements of external nature, such as a landslip, the increase of a flock of sheep, the death of a relative, or an accidental fire: or may be acts of a human being other than the human being whose rights or duties are under consideration lapse of time and change of place are among the events which are most productive of legal consequences.

2 - Acts

«Acts», in the widest sense of the term, are movements of the will. Mere deteermination of the will are «inward acts». Determinations of the will which produce an effect upon the world of sense are «outward acts». jurisprudence is concerned only with outward acts. An «act» may, there fore be defined for the purpose of the science, «a determination of will, producing an effect in the sensible world» The effect may be negative, in which case the act is properly described as «forbearance».

The essential element of such an act are three:

1 - An exertion of the will.

2 - An accompanying State of consiousness.

3 - A manifestation of the will.

Acts are divided by jurisprudence into those which are «lawful» and those which are «unlawful». The juristic result of the unlawful acts is never that aimed at by the doer. In the case of some lawful acts. their operation is independent of the intention of the doer; in the case others, his intention is directed to the juristic result.

In the last mentioned case, the act is technically described as a «juristic act». A definition of this is «a manifestation of the will of a private individual directed to the origin, termination, or alteration of rights».

Juristic act must, of course, exhibit in common with all act, an exertion of will, accompanied by consciousness, and exbressed; and any circumstance which prevents the free and intellilgent exertion of the will may either prevent the occurrence of the juristic act, or may modify the consequences which result from it what might appear to be a

juristic act is thus «null» and «void», i. e. has, as such, no existence, if due to such actual violence as excludes an exertion of will, if accompanied by states of consciousness, such as lunacy, drunkness, and certain kinds of mistake, which are in compatible with en intelligent exertion of will. So also a juristic act, which does come in to existence, is «voidable», i. e. is liable to be attacked and prevented from producing its ordinary results, if attended at its inception by «duress». by «fraud», and in some exceptionl cases, by mistaken motives.

Juristic acts are distingushed in to «one - sided», where the will of only one party is active, as in making a will accepting an inheritance, and «two - sided», where is a concurrence of two or more wills to produce the effects of the act. which is then a «contract» in the widest sense of that term.

INTRODUCTION TO THE STUDY of LAW

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